No. 92-487

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,
Petitioners,

v.

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,
Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,
Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) May a land use ordinance that is found to be a reasonable means of achieving a legitimate public purpose, and does not effect a "taking," nevertheless be held to deprive landowners of property in violation of Fourteenth Amendment "substantive due process," on the ground that it is "unduly oppressive"?

(2) May a city be held liable in damages under 42 U.S.C. § 1983 for denying due process rights guaranteed by the Fourteenth Amendment because the city continued, after a land use ordinance had been held invalid by a state trial court and before any appellate ruling, to apply the ordinance to persons who were not parties to the trial court proceedings?

(3) Did city administrative employees violate a "clearly established" federal constitutional right, so as to lose qualified immunity under 42 U.S.C. § 1983, by continuing, after a land use ordinance had been held invalid by a state trial court and before any appellate ruling, to apply the ordinance, on advice of official counsel, to persons who were not parties to the trial court proceedings?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the Supreme Court of the State of Washington in these cases.[1]

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners

OPINIONS BELOW

Robinson. The decision of the Washington Supreme Court is reported at 119 Wash. 2d 34, 830 P.2d 318 (1992), and is reproduced in the Appendix ("App.") at 1a-50a. The Order of the Washington Supreme Court retaining the direct appeal on the merits and transferring and consolidating the qualified immunity appeal with the direct appeal is unreported and is reproduced at App. 51a. The decisions of the Superior Court for King County, Washington are unreported and are reproduced at App. 55a-65a.

Sintra. The decision of the Washington Supreme Court in *Sintra* is reported at 119 Wash. 2d 1, 829 P.2d 765 (1992), and is reproduced at App. 69a-96a. The notice of appeal and ruling of the Washington Supreme Court accepting a direct appeal are unreported and are reproduced at App. 97a-98a. The decision of the Superior Court for King County, Washington is unreported and is reproduced at App. 100a.

JURISDICTION

The decisions of the Washington Supreme Court in both *Robinson* and *Sintra* were entered on May 14, 1992. Petitioners' motions for reconsideration in each case were denied on June 18, 1992 and June 17, 1992 respectively. The petition is therefore due on September 15, 1992. This court has jurisdiction under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

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state that the City of Seattle is a municipality and, as such, has no parent companies or subsidiaries. The other petitioners are all individuals and have no parent companies or subsidiaries.

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

42 U.S.C. § 1983 (1988) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

The first Seattle Housing Preservation Ordinance ("HPO I"), Ordinance 109220 (1980), formerly codified at Seattle Municipal Code ("SMC") Chapter 22.210, is reproduced at App. 136a-147a. HPO 1 was repealed and replaced by the second Housing Preservation Ordinance ("HPO II"), Ordinance 112342 (1985), also codified as SMC Chapter 22.210 and reproduced at App. 116a-135a.

STATEMENT

In these cases, the Washington Supreme court reversed summary judgments dismissing damage claims against petitioners, the City of Seattle and certain of its employees, under 42 U.S.C. § 1983. The court:

(1) ruled in both cases that Seattle's Housing Preservation Ordinance violated Fourteenth Amendment "substantive due process" rights of property owners because it was "unduly oppressive," even though the court acknowledged that the ordinance was reasonably necessary to accomplish a legitimate public purpose and did not find that the ordinance effected a "taking";

(2) ruled in both cases that the City and its employees could be liable under 42 U.S.C. § 1983 because they had continued, after plaintiffs in unrelated actions had obtained state trial court rulings declaring HPO provisions invalid and prohibiting their enforcement, to apply those provisions to persons who were not parties to those actions; and

(3) ruled in *Robinson* that City employees were not entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and subsequent cases because they continued to apply the HPO, on advice of the City Attorney, with knowledge of the state trial court rulings in unrelated actions; in *Sintra*, the court applied a similar immunity analysis but remanded to the trial court to determine the knowledge held by particular individuals.

A. Statement of Facts

1. *HPO I.* In 1980, the Seattle City Council responded to a critical decline in the rental housing stock by enacting a Housing Preservation Ordinance ("HPO I," App. 136a-147a). HPO I imposed a license fee on owners who demolished housing. The City could use these fees only to produce low-income housing. (Section 15, App. 146a). HPO I also required owners to relocate displaced tenants or to pay relocation assistance of up to $1000 per household, unless the tenant received other relocation benefits under state or federal law or was legally evicted (Sections 12, 13, App. 143a-145a).

In 1983 a building owner called San Telmo Associates sued the City in county Superior Court, claiming that HPO I was an unauthorized tax and violated

a state statute limiting development fees. In October 1983, the court entered a declaratory judgment of invalidity and a permanent injunction directing that "the Housing Demolition License fee provisions of the Housing Preservation Ordinance may not be enforced against San Telmo Associates or its heirs, successors, or assigns." (App. 106a, § 2). Seattle did not appeal this trial court ruling. The City Attorney advised petitioner William Justen, then director of the Department of Construction and Land Use ("DCLU"), that the Superior Court's ruling barred enforcement only against the named plaintiff and that the license fee requirements should be enforced against other persons.[2] Justen passed these instructions on to petitioner Ovid Thompson, the city employee with day to day responsibility for administering HPO I.

2. *HPO II.* In 1985 the City Council replaced HPO I with a new Housing Preservation Ordinance ("HPO II," App. 116a-135a). HPO II did not impose a license fee, but in certain cases it required an owner demolishing housing to replace a percentage of the housing or take specified equivalent action. HPO II also required an owner to relocate low-income tenants or pay relocation assistance of up to $2000 per household. (Section 10, App. 123a-124a).

HPO II offered administrative relief to owners who could not make "profitable use of the property" if the housing replacement requirements were strictly applied. (Section 13, App. 130a-132a). When an owner applied for relief, Petitioner David Moseley, director of the Department of Community Development ("DCD"), would report to DCLU on "the owner's

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[2] The DCLU Director is required by law to "charge such fees for licenses ... as may be provided by ordinance." SMC § 3.06.050. (App. 148a).

ability to make profitable use of [the] property if the housing replacement requirement is imposed." (App. 131a).

The same developer that had successfully challenged HPO I sued the City in Superior Court to invalidate the replacement housing provisions of HPO II under state law ("*San Telmo II*"). In July 1986, the court held that the housing replacement provisions of HPO II effectively imposed a tax in violation of state law and enjoined enforcement against the named plaintiffs.

The City appealed. The City Attorney advised petitioner Holly Miller, who had by then become Director of DCLU, that while the appeal was pending HPO II should be enforced against other persons. Miller so instructed Thompson. The Washington Supreme Court affirmed the trial court decision in April of 1987. *San Telmo Assocs. v. Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987). On advice of the City Attorney, DCLU then immediately stopped enforcing the housing replacement provisions.

In 1986, a different plaintiff, R/L Associates, Inc., sued the City in Superior Court challenging the relocation assistance provisions of HPO II, which had not been at issue in the *San Telmo* cases. On December 7, 1987, the King County Superior Court issued a declaratory judgment that "the Tenant Relocation Assistance provisions . . . may not be enforced against plaintiffs, their heirs, successors, or assigns," and granted plaintiffs a permanent injunction against their enforcement. (App. 111a). The City appealed.

Petitioner Miller again followed the City Attorney's advice that the Superior Court order barred enforcement of the relocation assistance provisions only

against named parties and that the City could continue to enforce these provisions against non-parties. In March 1988, R/L Associates obtained a contempt order against the City, Miller, and Thompson for applying the relocation assistance provisions to other persons. (App. 114a). DCLU immediately ceased enforcement of those provisions. The Washington Supreme Court affirmed the trial court's original judgment on state law grounds, and the contempt judgment, in *R/L Associates, Inc. v. City of Seattle*, 113 Wash. 2d 402, 780 P.2d 838 (1989).[3] The City Council repealed HPO II in 1990.

B. Proceedings Below

1. *Trial Court.*

a. *Robinson.* On May 27, 1988 respondents Roy W. and Kathleen Robinson, d/b/a Computer Slide Company ("Robinson"), filed suit in county Superior Court against petitioner City and petitioners Justen, Ryan, Miller, and Thompson, on behalf of all property owners who had paid license fees or relocation assistance pursuant to either HPO I and II. The complaint made state law claims for refunds and also alleged that HPO I and II took property in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and that the individuals named had

> maliciously, recklessly and/or wantonly violated the constitutional rights of the plaintiff and others similarly situated by willfully enforcing an ordinance unconstitutional on its

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[3] The trial court had also held that enforcement of the relocation assistance provisions violated the Takings and Due Process Clauses of the federal and state constitutions. The Washington Supreme Court reversed the substantive due process holding and did not reach the takings issue.

> face even after the ordinance had been declared invalid and/or continued enforcement had been permanently enjoined by judicial decree.

Respondents sought, *inter alia*, damages under 42 U.S.C. § 1983, including punitive damages against the individuals. The individual defendants asserted the defense of qualified immunity in their answer.

On March 30, 1989, the Superior Court granted the individual defendants' motion for summary judgment on qualified immunity grounds and dismissed the claims against the individuals. (App. 62a). Respondents appealed. On May 1, 1989, the trial court granted the City's motion for summary judgment on the remaining federal civil rights claims. (App. 59a). On January 30, 1990, the court granted summary judgment holding the City liable under state law for all fees paid by respondents within three years before the filing of the lawsuit (App. 57a); on February 28, 1990 the class was awarded judgment for $430,271.47, plus costs and statutory attorney fees, on the state law claims (App. 55a).

Respondents appealed the denial of their federal claims as well as certain state law issues, and the City appealed the award on the state law claims. The Washington Supreme Court accepted direct review of all issues.

b. *Sintra*. In 1986 respondent Sintra, Inc. applied for relief from the housing replacement provisions of HPO II in order to convert a dilapidated hotel formerly housing low-income tenants into a mini-warehouse. The request for relief was pending while *San Telmo II* was on appeal. The DCLU Director, upon recommendation of petitioner Moseley, waived the housing replacement requirement for so long as

Sintra used the property as a mini-warehouse. On Sintra's appeal, the Hearing Examiner ruled that a permanent exemption would exceed the relief necessary to accommodate reasonable development, and remanded to DCLU. Sintra did not appeal. The State Supreme Court then decided *San Telmo II*; DCLU stopped enforcing HPO II's replacement housing provisions; and Sintra received its permit approval without paying for any replacement housing.

On October 5, 1988, Sintra, Inc. sued the City and petitioners Ryan, Miller, Thompson and Moseley, alleging that enforcement of HPO II violated Sintra's federal civil rights, the state constitution, and various state statutes. Sintra sought compensatory and punitive damages and attorney's fees. The individual defendants raised the immunity defense in their answer. On February 28, 1990, the Superior Court granted summary judgment dismissing Sintra's claims. (App. 100a). Sintra appealed. The Washington Supreme Court accepted direct review and ordered that *Sintra* be argued as a companion case to *Robinson*. (App. 97a, 51a).

2. *Washington Supreme Court.* On May 14, 1992, the Washington Supreme Court, in separate opinions, reversed the trial court judgments and reinstated the § 1983 claims against both the City and its employees. (App. 1a, 69a).

a. *Robinson.* The court affirmed dismissal of all of the taking claims, because plaintiffs had offered no evidence that the HPO denied all economically viable use of the property regulated. The court then held that the HPO nevertheless violated the substantive due process component of the Fourteenth Amendment because it was "unduly oppressive." The court acknowledged that the HPO had a legitimate governmental purpose and that the means used were "rea-

sonably necessary" to achieve it. (App. 14a). However, citing its earlier decision in *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990), the Court held that substantive due process involves a third test: whether an ordinance is "unduly oppressive," an inquiry which "lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner." (App. 11a). The court held

> the HPO to be an unduly oppressive, and thus unreasonable, regulation [that] therefore violated the rights of the Robinsons [*i.e.*, the entire class] to substantive due process . . . .
>
> . . . [Because] a substantive due process violation is a deprivation of a federal constitutional right, the Robinsons may also be entitled to seek a damages remedy under federal statutes [i.e., 42 U.S.C. § 1983].

(App. 15a-16a).

The court then tied damage recovery for the supposed substantive due process violation to an altogether different part of the facts: petitioners' continued enforcement of the HPO provisions after the trial court rulings in other cases declaring them invalid. It said,

> A land use decision denying substantive due process states a cause of action under section 1983 only if it is invidious or irrational, *see R/L Assocs.*, at 412, or arbitrary, *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

(App. 20a-21a). The court then concluded that "a finder of fact could determine that the City acted arbitrarily and capriciously in repeatedly continuing enforcement of the HPO, rather than seeking to stay

the force or effect of rulings of invalidity and injunctions against enforcement." (App. 23a).

With respect to the individual petitioners, the court purported to apply the qualified immunity principles set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny. The court acknowledged that the HPO did *not* violate a clearly established federal right, because ordinances similar to the HPO had been upheld in other states against substantive due process challenges. (App. 26a). Nonetheless, the court denied the individuals immunity because of their role in continued enforcement after the state court invalidation rulings. The court relied on a pre-*Harlow* case that neither applied the "clearly established" test nor involved substantive due process, but that categorically denied immunity to public officials violating an administrative order. (App. 27a).

The court rejected the contention that, having received clear advice from the City Attorney, a reasonable official could have believed that it was not unconstitutional to continue to apply the ordinances to non-parties to the *San Telmo* and *R/L* cases. Instead, the court stated that immunity must be determined "*without reference* to legal advice rendered by the prosecuting attorney," (App. 28a, emphasis in original), citing *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991), where this Court denied *absolute* immunity to a prosecutor giving legal advice but recognized that *qualified* immunity was still available to the prosecutor and those who followed his advice. The court therefore remanded all § 1983 claims for trial.

b. *Sintra*. The court repeated the due process balancing test employed in *Robinson* and held that "the oppressive nature of the [HPO] is itself violative

of due process." *Sintra* (App. 85a).[4] The court then reasoned that the City could be liable for money damages under § 1983 for "irrational" conduct because it offered only "conditional relief" to Sintra after the trial court in *San Telmo II* found the housing replacement provisions invalid under state law and enjoined enforcement against the plaintiffs in that action. (App. 88a).

The court rejected the City employees' arguments that qualified immunity applied because *Sintra* had not shown a violation of a clearly established federal right and because petitioners were non-lawyers following advice of counsel. Although the express language of the *San Telmo II* injunction prohibited enforcement only against the named plaintiffs, their heirs, successors and assigns, the court concluded that "a reasonable person should have known that enforcing the HPO in contravention of a court order prohibiting enforcement would constitute a denial of someone's rights." (App. 90a).

Petitioners sought reconsideration in both cases, emphasizing the conflict between the substantive due process and immunity tests applied and this Court's decisions. The court denied reconsideration in both cases.

REASONS FOR GRANTING THE PETITION

A. The Washington Supreme Court's Substantive Due Process Test for Land Use Legislation Conflicts With This Court's Precedents.

In these cases the Washington Supreme Court devised a federal constitutional right for landowners that would swallow the Takings Clause. It held that a

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[4] Only housing replacement, not relocation assistance, was at issue in *Sintra*. (App. 71a, n.1).

rationally based land use regulation that does not go so far as to effect a taking may nonetheless be unduly oppressive in violation of Fourteenth Amendment substantive due process and expose a city to damages under 42 U.S.C. § 1983. That holding conflicts with this Court's decisions; indeed, it is explicitly based on 19th Century dictum that this Court has long since repudiated.

In *Robinson*, the Washington Supreme Court rejected a facial takings challenge to the HPO, holding that "the ordinance did advance legitimate state interests" and that respondents could not show that they were deprived of all economically viable use of their property. (App. 14a). The court also found that the HPO employed "reasonable means" to achieve its public purpose. (App. 14a). Nonetheless, the court held that the HPO, on its face, violated respondents' Fourteenth Amendment right to substantive due process because the ordinance was "unduly oppressive."[5] The court stated that the Due Process Clause gives courts "wide discretion" to balance the "public's interest against those of the regulated landowner." *Robinson* (App. 11a), quoting the court's earlier decision in *Presbytery*, 114 Wash.2d at 331, 787 P.2d at 913.

The Washington court based this doctrine on a dictum in an ancient case of this Court, but it ignored

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[5] The Washington court clearly believed it was upholding federal constitutional rights. *See Michigan v. Long*, 463 U.S. 1032 (1983). The issue before it was whether the city could be liable under 42 U.S.C. § 1983, which of course applies only to the deprivation of federal rights. Earlier state cases cited in *Robinson* (App. 11a) for the "unduly oppressive" test relied on *Lawton v. Steele*, 152 U.S. 133 (1894) and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). *See Presbytery*, 114 Wash. 2d at 330 n.17, 787 P.2d at 913 n.17; *West Main Associates v. Bellevue*, 106 Wash. 2d 47, 52, 720 P.2d 782, 786 (1986).

the numerous more recent decisions establishing that "undue oppression" is not an independent ground for invalidating rationally based economic regulation. The earlier case is *Lawton v. Steele*, 152 U.S. 133 (1894)[6], which the court cited in *Sintra* (App. 85a). *Robinson* and earlier Washington cases that endorsed the "undue oppression" test relied heavily upon a law review article that erroneously concluded that "*Lawton v. Steele* remains a vigorous decision, in good standing in the Supreme Court . . ."[7]

This Court has long since explicitly rejected the "unduly oppressive" test on the ground that legislatures should determine the wisdom of economic regulation. In *Brotherhood of Locomotive Firemen v. Chicago, Rock Island and Pacific Railway Co.*, 393 U.S. 129, 143 (1968), the Court easily reversed a judgment based on *Lawton*:

> The railroads also argue that the statutes violate the Due Process Clause because they

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[6] The dictum is,

> To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 137. Lawton applied this test to *uphold* the summary destruction of illegally placed fishing nets.

Certain state supreme courts have cited *Lawton* for its first two criteria and even recited this dictum, but have omitted the "unduly oppressive" phrase. *E.g.*, *State v. Hartog*, 440 N.W.2d 852, 857 (Iowa 1989) (upholding mandatory seat belt legislation); *People v. Poucher*, 247 N.W.2d 798, 799 (Mich. 1976) (upholding motorcycle helmet requirement).

[7] Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. Urb. and Contemp. L. 3, 20-21 (1983).

> are "unduly oppressive" and impose costs on the regulated industry that exceed the public benefits . . . we think, with all due deference to appellees and the District Court, that these contentions require no further consideration.

The *Rock Island* Court cited a line of cases from *Nebbia v. New York*, 291 U.S. 502 (1934), to *Ferguson v. Skrupa*, 372 U.S. 726 (1963). In *Ferguson*, the Court declared that it had abandoned "the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise," and that the Court does not "sit as a 'superlegislature to weigh the wisdom of legislation' ". *Id.* at 731.

Economic regulation violates due process only if it is arbitrary or irrational, a conclusion the state court expressly rejected here. In *Pension Benefit Guaranty Association v. Gray*, 467 U.S. 717, 729 (1984), this Court said:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that *the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.*"

(quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); emphasis added). *See also Pennell v. San Jose*, 485 U.S. 1, 11 (1988), rejecting a due process challenge to rent control, because it was not shown to be "arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt."[8] As the Court said unanimously last Term:

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[8] The Due Process Clause does *not* require the *substantial*

> . . . the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. . . judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. Harker Heights, 112 S. Ct. 1061, 1068 (1992).

The courts of appeals have reached similar conclusions. For example, in *Gilbert v. Cambridge*, 932 F.2d 51, 65 (1st Cir.), *cert. denied*, 112 S. Ct. 192 (1991), the court upheld an ordinance restricting condominium conversions, stating: "a substantive due process challenge to municipal legislation of a social or economic nature 'asks only whether a *conceivable* rational relationship exists between the . . . ordinance and legitimate governmental ends'." (italics in original). *See also Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991). In *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 465 (7th Cir. 1988), the court rejected a claim that a land use decision violated substantive due process, saying: "The concept invests judges with an uncanalized discretion to invalidate federal and state legislation." The court held that a land use regulation "can be said to violate substantive due process only if it is irrational." *Id.* at 467.

Land use regulation is traditionally and properly evaluated under the Takings Clause. This Court has devoted considerable effort to defining the criteria for

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relationship that is required under some circumstances by the Takings Clause. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

determining whether a regulation has gone "too far" and become a taking. Just last Term, the Court again recognized that "government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate," when the regulation rationally furthers a state purpose and does not deny all beneficial use. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992). The Washington court's approach would replace the regulatory taking doctrine with a roving inquiry into "undue oppression,"[9] and inhibit local legislatures, fearful of § 1983 liability, in the rational exercise of their police powers.

B. The Washington Supreme Court's Holding That a City and Its Employees May Be Liable for Damages Under 42 U.S.C. § 1983 for Continuing To Enforce an Ordinance After a State Trial Court Has Declared It Invalid Gives Wholly Inappropriate *Federal* Law Effect to State Trial Court Decisions.

In *Sintra*, the Washington Supreme Court held that a city and its employees could be liable for damages under § 1983 for "irrational" or "arbitrary" conduct because they continued to apply certain provisions of an ordinance to respondents after a state trial court had held the provisions invalid on state law grounds in an unrelated case and had enjoined the city from enforcing them against the plaintiffs in that case.[10]

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[9] The Washington court acknowledged as much: it said that it expects an increasing number of land use disputes; that in many cases its substantive due process analysis, rather than takings analysis, will apply; and that the result usually will turn on the "unduly oppressive" test. *Sintra*, App. 69a; *Robinson*, App. 14a.

[10] Neither the court's opinion in *Sintra* nor its opinion in *Robinson* makes clear what it thought was the relationship between (1) the supposed "undue oppressiveness" of the HPO and (ii)

The court reached essentially the same conclusion in *Robinson*.[11] If that were the law, officials would have to abandon enforcement after any adverse trial court ruling, even one on appeal in which they expected to win a reversal. They would be forced to appeal every trial court decision rather than settle or wait for a more important or better case to obtain a definitive decision.[12] In effect, there would be constitutionally mandated nonmutual collateral estoppel against the government.

But that is not the law. To the contrary, in *United States v. Mendoza*, 464 U.S. 154 (1984), this Court reversed an application of nonmutual collateral estoppel, holding that a federal agency was entitled to relitigate an issue decided by a district court. Moreover, the court of appeals decisions most nearly on point indicate that a state does *not* violate due process by enforcing statutory requirements against other persons after lower court rulings of invalidity. *See Ostrosky v. Alaska*, 913 F.2d 590 (9th Cir. 1990) (enforcement of fishing permit requirement while appealing a lower court ruling, in a criminal case involving the same defendant, that the permit statute was invalid). In *Lee v. Dugger*, 902 F.2d 822, 824 (11th Cir.

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the supposed arbitrariness of continued enforcement after the state trial court's rulings in separate proceedings. We read the Court as requiring *both* elements before there can be a damage remedy under § 1983, *Sintra* (App. 91a); *Robinson* (App. 15a-16a). In any event, both elements involve important errors of federal law.

[11] Some, but not all, of the *Robinson* plaintiffs' claims arose after a later state court ruling had also invalidated other HPO provisions on both state and federal grounds. *See* pp. 6-7 *supra* and n.14, *infra*.

[12] There may be numerous valid reasons not to appeal, including limited resources, small amounts in controversy, settlement, multiple bases for liability, or mootness.

1990) (per curiam), where the State Corrections Department imprisoned an inmate longer than a state appellate court's construction of a statute regarding "gain-time" would allow, the court stated that "the Department was entitled to attempt to persuade the same court that its prior decision was in error" and held the Corrections Secretary immune from liability under § 1983.[13] *See also* Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1371 (1991) ("even staunch critics of intracircuit nonacquiescence do not advocate forced acquiescence in district court decisions").

More generally, the Washington Court's decision construes § 1983 to federalize matters of purely state concern. It is particularly inappropriate to create a federal constitutional remedy for nonacquiescence in a state trial court decision when that decision is based solely on state law.[14] Section 1983 "does not provide a remedy for abuses that do not violate federal law," *Collins v. Harker Heights*, 117 S. Ct. at 1065. If an ordinance is invalid under state law, then state law, not § 1983, should provide the remedy for claims based on its enforcement. *See Chesterfield Dev. Corp. v. Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) (no due process violation "even if the City had know-

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[13] A decision not to acquiesce in a lower court's interpretation is, of course, different from discriminatory enforcement; *cf. Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (city "single[d] out one individual to be treated discriminatorily" in violation of its own regulations and contrary to the city attorney's advice). Seattle is not accused of discriminatory conduct.

[14] The two *San Telmo* decisions were based solely on state law. The *R/L Associates* decision invoked federal grounds as well (one of which was later reversed and the other not reached on appeal). *See* p. 7, *supra*. However, the trial court order in *R/L Associates* was not issued until *after* Sintra's permit approval and after the claims of certain *Robinson* plaintiffs arose.

ingly enforced the invalid zoning ordinance in bad faith . . ."); *Chiplin Enter., Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) (even bad faith refusal to issue a building permit in violation of state law did not violate substantive due process, so as to give rise to § 1983 claim, when state remedies were available).[15]

The holding that nonacquiescence in a trial court ruling, on advice of counsel, may result in § 1983 liability, conflicts with the principle that wrongful administrative action does not violate due process unless "egregiously unacceptable, outrageous, or conscience-shocking," *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990). *See also Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 691 (Minn. 1991) (no § 1983 claim based on denial of a land use permit where city's actions, although "at best, arbitrary", "did not rise to the level of 'egregious' and 'irrational' conduct required by the federal courts"); *Condor Corp. v. St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (denial of permit for a heliport based on erroneous advice of city attorney failed to support a claim under federal law); *Midnight Sessions*, 945 F.2d at 683 (no due process violation unless "the City denied the applications due to some improper motive such as political motivation or racial animus").[16]

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[15] The *Chesterfield* court adopted the reasoning of a five-judge concurrence in *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (en banc) (per curiam), stating that in local zoning and land-use cases, a § 1983 claim requires "truly irrational" conduct, such as applying an ordinance only to persons whose names begin with certain letters, and that it is not enough that conduct is in violation of state law.

[16] The *Robinson* and *Sintra* opinions sometimes imply that the City intentionally violated court orders. There is no basis whatever for that implication with respect to the two *San Telmo*

The *Robinson* respondents have received refunds of the fees they paid. Other state law remedies are available.[17] There is no need to expand dramatically the reach of § 1983.

C. The Washington Supreme Court's Test for Qualified Immunity Conflicts With This Court's Precedents.

The qualified immunity decisions below conflict with this Court's recent qualified immunity precedents. *Robinson* and *Sintra* denied qualified immunity to City of Seattle employees who, upon the advice of the City Attorney, applied HPO provisions to non-parties after trial court decisions invalidating those provisions. The Washington court misplaced the burden of proof, failed to require a showing that clearly established federal rights were violated, and misread a recent decision of this Court to require that it disregard petitioner's reliance on official legal advice.

Beginning with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court has reformulated the qualified immunity doctrine, making it clear that qualified im-

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injunctions, both of which plainly prohibited enforcement only against named parties. (App. 106a, §§ 2-3, 109a-110a, §§ 2-3). With respect to the third case, *R/L Associates* (which as previously noted has no bearing on the claims of the *Sintra* plaintiffs and some of the *Robinson* plaintiffs, *see* n.14 *supra*), the record is clear that the City Attorney advised petitioners that the injunction protected only the named plaintiffs. That advice was later held in error, giving rise to claims for refunds and a contempt order under state law. In any event, such a misreading of the scope of a state court injunction does not justify a federal damage remedy.

[17] Washington law allows a property owner who has applied for a permit to recover damages if agency action is untimely, arbitrary or capricious; or if a final agency decision should reasonably have been known to have been unlawful. WASH. REV. CODE § 64.40.020(1). The Robinsons' claim under this statute was dismissed on summary judgment as untimely, and they did not appeal. Sintra's claim was dismissed and not appealed.

munity is based on "special policy concerns involved in suing government officials," *Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992), and that its purpose is to prevent "the distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816.

To achieve this purpose, qualified immunity is the norm; only in extraordinary cases should it be denied. *Harlow*, 457 U.S. at 807. Since *Davis v. Scherer*, 468 U.S. 183, 197 (1984), it has been clear that the plaintiff bears the burden to prove a violation of a *clearly established* federal right. *Robinson* and *Sintra* squarely conflict with *Davis* because in both cases the court permitted qualified immunity to be defeated without any such showing. *Robinson* cited only a pre-*Harlow* immunity case categorically denying qualified immunity to an official who violated an administrative order interfering with plaintiff's First Amendment rights, *Donovan v. Reinbold*, 433 F.2d 738, 744 (9th Cir. 1970), and a district court ruling that had been vacated on the ground that the court should have abstained from deciding § 1983 claims in a local land use matter, *Front Royal & Warren County Indus. Park Corp. v. Front Royal*, 708 F. Supp. 1477, 1483 (W.D. Va. 1989), *vacated*, 945 F.2d 760 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1477 (1992). (App. 27a and 29a n.5). *Sintra*, without citation to any authority, merely concluded that a "reasonable person should have known that enforcing the HPO in contravention of a court order prohibiting enforcement would constitute a denial of someone's rights." (App. 90a).

Continuing to apply HPO provisions to other persons after a state trial court has declared them invalid did not violate any federal rights at all, *see* Section B *supra*, much less any "clearly established" federal

rights. To violate clearly established federal rights, the violation must be apparent; where there is a legitimate question as to the state of the law, it cannot be said that the official's action violates clearly established law. *Mitchell v Forsyth*, 472 U.S. 511, 535 n. 12 (1985). The breadth of this doctrine is illustrated by *McBride v. Taylor*, 924 F.2d 386 (1st Cir. 1991), in which the court granted qualified immunity to Farmer's Home Administration officials who violated an injunction requiring notice of foreclosure, stating, "even if the defendants violated the *Coleman* injunction, conduct which we do not condone, their actions would not amount to a violation of a clearly established constitutional due process right." *Id.* at 391.

Moreover, immunity must be granted if a reasonable employee *could* have believed that his or her actions did not violate any federal right. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Immunity is denied only if *no* reasonable public employee under the same circumstances could have reached that conclusion. Qualified immunity "gives ample room for mistaken judgments," and makes accommodation for "reasonable error" so that " 'officials [will] not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991), quoting *Davis*, 468 U.S. at 196. In *Hunter* this court said "the [trial] court should ask whether the [defendant officials] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact." 112 S. Ct. at 537.

In *Robinson* and *Sintra* the court ignored this second prong of the qualified immunity doctrine. It simply did not ask the key question—whether a reasonable official *could* have believed it would not violate respondents' federal rights to continue, upon

advice of counsel, to apply an ordinance after a state trial court had declared it invalid and had granted unrelated parties an injunction against its enforcement.[18]

The Washington Court instead stated that "qualified immunity does not extend to those officials who knowingly violate the law," equating knowledge of the *existence* of a court order with a "knowing" violation of the law (notwithstanding the City Attorney's advice as to the legal effect of the order) and wholly omitting to consider whether there was a knowing violation of *federal* law. (*Robinson*, App. 27a-29a).

In addition, the *Robinson* court read this court's opinion in *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991), to indicate that "*Harlow*['s] objective standard applies to police conduct *without reference* to legal advice rendered by the prosecuting attorney . . ." (App. 28a, emphasis in original). But that is wrong. *Burns* denied *absolute* immunity to a prosecutor but recognized that *qualified* immunity was still available to the prosecutor and those who followed his mistaken legal advice. Courts of appeals have made it clear that legal advice is pertinent to whether officials acted reasonably under the circumstances. In *Arnsberg v. United States*, the court granted qualified immunity to an I.R.S. agent executing an invalid material witness warrant, stating:

> It would be plainly unreasonable to rule that the [officials] must take issue with the considered judgment of an assistant United

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[18] This second prong of the qualified immunity analysis should also be decided on summary judgment, if possible. *Anderson*, 483 U.S. at 641, *Hunter*, 112 S. Ct. at 536; *Arnsberg v. United States*, 757 F.2d 971, 982 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986).

> States Attorney and the federal magistrate. . . . it would also mean that lay officers must at their own risk second-guess the legal assessments of trained lawyers. The Constitution does not require that allocation of law enforcement duties.

757 F.2d at 981. *See Floyd v. Laws*, 929 F.2d 1390, 1394 (9th Cir. 1991) (upholding qualified immunity in light of reliance on prosecutor's advice regarding probable cause); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 887-888 (9th Cir. 1990) (qualified immunity granted to police officer involved in unlawful employment decision after following city attorney's advice); *Ortiz v. Van Auken*, 887 F.2d 1366 (9th Cir. 1989) (qualified immunity granted to officer who sought legal advice and warrant before acting); *V-1 Oil Co. v. Wyoming Dept. of Env'l Quality*, 902 F.2d 1482, 1489 (10th Cir.), *cert. denied*, 111 S. Ct. 295 (1990) (environmental official granted immunity for warrantless search executed upon advice of counsel).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1992

92-487

No. _____

Supreme Court, U.S.
FILED
SEP 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

v.

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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APPENDIX

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SUPREME COURT OF WASHINGTON

No. 57038-8

ROY W. ROBINSON, ET AL,

Appellants,

v.

THE CITY OF SEATTLE, ET AL,

Respondents.

EN BANC

MAY 14, 1992

GUY, J. — Plaintiffs appeal from a dismissal of their class action. Roy and Kathleen Robinson and that class of persons similarly situated seek reversal of a trial court's rulings which dismissed their civil rights actions against the City of Seattle and individual officials, applied a 3-year statute of limitation to their claims for refunds of payments they made under the City of Seattle's Housing Preservation Ordinance and denied their request for reasonable attorney fees. The City of Seattle (City) cross-appeals, arguing the trial court erred in awarding the partial refund. We will refer to the class in this action as the Robinsons.

FACTS

Background

The Robinsons' appeal comes to this court following two decisions of this court which held invalid both sections of the City's Housing Preservation Ordinance (HPO).[1] By the time of this court's decisions upholding invalidation of the HPO, the Robinsons had paid substantial sums to the City under the ordinance.

The Housing Preservation Ordinance, former Seattle Municipal Code (SMC) 22.210, was originally enacted in

[1] *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989); *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987).

1980. Its stated purpose was to mitigate the loss of low income housing in the city caused by demolition for development and to reduce the hardships experienced by displaced tenants. Former SMC 22.210.020. With some exceptions, the original version of the ordinance (HPO-1) required that before a change of use or demolition of housing units could occur, a housing-demolition license fee had to be paid to the City in an amount prorated to the number of units to be demolished, with the fee to be used for building and rehabilitation of low income housing. In its provisions for the protection of low income tenants the ordinance additionally required that tenants be given a 120-day notice of an intended demolition, and that low income tenants be either relocated or, at the option of the landlord, paid up to $1,000 per family in relocation assistance.

Approximately 2 years after the passage of the City's HPO-1, the State Legislature amended RCW 82.02.020 to provide in part that "[n]o county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings . . . or on the development, subdivision, classification, or reclassification of land." *See* Laws of 1982, 1st Ex. Sess., ch. 49, § 5. Later that same year this court, without reference to RCW 82.02.020, invalidated two county ordinances which imposed fees on new residential developments as offsets to increased service costs and for the construction of park land. *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wn.2d 804, 650 P.2d 193 (1982). This court in *Hillis Homes* held the development fees were invalid taxes (because their primary purpose was to raise money since the fees were fiscal and not regulatory), and thus held the ordinances requiring the fees invalid as there was no express authority permitting such taxes. After the *Hillis Homes* decision, the Seattle city attorney determined that neither *Hillis Homes* nor RCW 82.02.020 invalidated HPO-1. The city attorney reasoned that HPO-1 was a regulatory enactment and a demolition fee, not a develop-

ment fee, and advised the Department of Construction and Land Use (the Department) to continue enforcement.

In October 1983, the King County Superior Court granted San Telmo Associates a declaratory judgment, ruling the HPO-1 housing replacement fee provision an invalid tax prohibited by RCW 82.02.020, and awarded San Telmo, its heirs and assigns an injunction against the City's enforcement of HPO-1. The city attorney advised the Department that the superior court ruling was erroneous. The city attorney also indicated that because it was a limited ruling, applying only to San Telmo, the City would not appeal as it planned to redraft HPO-1. The city attorney advised the Department that HPO-1 was enforceable against nonparties to the action.[2] The City did not appeal, complied with the injunction vis-a-vis San Telmo Associates while continuing to enforce the ordinance against all others similarly situated, and later began redrafting the HPO.

A new draft of HPO-1 was completed by a task force in spring 1984. The new draft was presented to the City Council in September 1984. In July 1985, the City repealed HPO-1 and enacted a new version of the HPO, which we shall call HPO-2. HPO-2 had the same purpose as HPO-1 but did not require payments to the City. Instead, it required owners to replace a percentage of the housing demolished, with the option that a landowner could make a payment to the City rather than build replacement housing. Significantly, HPO-2 added an administrative relief provision which exempted owners from the replacement housing requirements if compliance would deprive the owners of all economically viable use of the property. HPO-2 still included, as did HPO-1, tenant notice and relocation assistance provisions.

After the City enacted HPO-2, San Telmo Associates again filed suit challenging the housing replacement provisions. In July 1986, the King County Superior Court declared the housing replacement provision an unauthorized tax or fee, and granted an injunction. The city

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[2]We note that the city attorneys involved in this appeal are not the attorneys who provided the legal advice mentioned in this opinion.

attorney concluded the superior court's decision was in error, would be reversed on appeal, and advised the Department the City was appealing the ruling to the Supreme Court. The City was also advised to continue enforcement against nonparties to San Telmo's action, based on the reasoning that the superior court ruling affected only parties to the suit. The Department continued enforcement except against San Telmo.

In April 1987, this court held the housing replacement provisions of HPO-2 invalid as an unauthorized tax under RCW 82.02.020. *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987). This court noted that HPO-2 differed materially from HPO-1:

> There is no indication that the City attempted to adopt the second ordinance merely to avoid the trial court order invalidating the first ordinance; rather, the second ordinance was specifically enacted with changes designed to cure the defects in the original ordinance.

San Telmo, at 23. The *San Telmo* decision did not reach any constitutional claims or federal statutory claims and did not address the validity of the tenant relocation assistance provisions of HPO-2.

After this court's *San Telmo* decision, the city attorney advised the Department to stop enforcement of HPO-2's housing replacement provisions. The Department was advised, however, that it could continue enforcement of HPO-2's remaining tenant relocation assistance provisions.

In December 1987, the King County Superior Court held HPO-2's tenant relocation assistance provisions were an unauthorized tax in violation of RCW 82.02.020, as well as a violation of the Fifth and Fourteenth Amendments, and of article 1, sections 3 and 16 of the Washington Constitution. The court granted R/L Associates an injunction against enforcement of the tenant relocation assistance provisions. The City appealed.

In the interim, the city attorney informed the Department of the superior court decision granting an injunction

to R/L Associates, its heirs and assigns. The Department was advised that since the order was restricted to the parties, the Department must stop enforcement vis-a-vis R/L Associates, but could continue enforcement against nonparties. The City issued a news release stating it would continue enforcement of the tenant relocation assistance provisions of HPO-2 against all but R/L Associates.

In March 1988, R/L Associates obtained a contempt judgment against the City, Holly Miller (the director of the Department), and HPO administrator Ovid Thompson for continued enforcement of the tenant relocation assistance provisions of HPO-2, as it constituted a failure to comply with the permanent injunction awarded R/L Associates. The Department then stopped enforcement of the relocation assistance provisions of HPO-2.

In the City's appeal of the R/L Associates decision, this court held that the tenant relocation assistance provisions of HPO-2 violated RCW 82.02.020, but did not hold HPO-2 to be a tax. *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989). For the City's noncompliance with the superior court injunction against continued enforcement of invalidated HPO provisions, this court upheld the contempt judgment against the City. This court declined to reach the taking issue raised by the plaintiffs in *R/L Assocs.*, and reversed the trial court's ruling that enforcement of HPO-2 violated substantive due process, as the plaintiffs had made "no allegation of irrational, or arbitrary or capricious conduct on the part of the City in its denial of [the] demolition license." *R/L Assocs.*, at 412.

Procedural History

On May 27, 1988, Roy and Kathleen Robinson, on behalf of themselves and the class of persons who paid demolition license fees or tenant relocation assistance pursuant to either HPO-1 or HPO-2, filed this action against the City and four individual employees: William Justen, Beatrice Ryan, and Holly Miller, all successive directors of the Department during the time the HPO was effective; and

Ovid Thompson, the official responsible for the administration of the HPO. The complaint sought compensatory and punitive damages for enforcement of the tenant relocation assistance and housing replacement/fee provisions of HPO-1 and HPO-2, claiming the City "maliciously, recklessly and/or wantonly" violated the constitutional rights of the Robinsons and the class by "willfully" enforcing an unconstitutional ordinance. The class was certified. The individual defendants moved for summary judgment to dismiss the claims against them on the basis of qualified immunity. The Robinsons moved to strike the defendants' qualified immunity defenses and claimed the City was liable for damages under 42 U.S.C. § 1983. The City moved to dismiss the section 1983 claims. On March 30, 1989, the King County Superior Court granted the individual defendants' motion to dismiss the personal liability claims. On May 1, 1989, the court granted the City's cross motion for summary judgment dismissing the section 1983 civil rights claims.

On January 30, 1990, the trial court entered a partial summary judgment order, applying a 3-year statute of limitation, holding the City liable for sums paid by the Robinsons within 3 years of the filing of the lawsuit. The parties stipulated to factual issues remaining for trial and waived jury trial. The City submits it offered to settle this action for $422,761.12 at this time and that this offer was rejected. The Robinsons dispute the timeliness of this offer.

On February 28, 1990, the Superior Court awarded the Robinsons $430,271.47, costs and statutory attorney fees of $125. The court denied Robinsons' renewed motion for attorney fees on March 21, 1990.

This action is an appeal from the February 28, 1990, final judgment and the March 21, 1990, superior court order denying attorney fees. The City cross-appeals the final judgment and the January 30, 1990, summary judgment order holding the City liable for refunds. The appeal of the order dismissing the Robinsons' action against the individual city officials has been consolidated.

ISSUES

The following issues are presented:

FIRST: Did the trial court err when it dismissed the Robinsons' civil rights claims against the City of Seattle?

SECOND: Did the trial court err when it dismissed the plaintiffs' civil rights claim against the individual city officials?

THIRD: Did the trial court err when it awarded a refund for payments made pursuant to the Housing Preservation Ordinance, which has been invalidated? (Cross appeal of City).

FOURTH: If any refunds were proper, did the trial court err when it applied a 3-year statute of limitation to the plaintiffs' claims?

FIFTH: Did the trial court err in denying the attorney fee requests of the Robinsons?

ANALYSIS

This case, as well as that of *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, ___ P.2d ___ (1992), involves a claim against the City of Seattle and its officials under 42 U.S.C. § 1983. The gravamen of such a claim is that a person acting under the color of state law has deprived a person of a federal right.

Resolution of the civil rights claims in this appeal requires us to address the much-debated power of government to interfere with the free enjoyment of privately owned property. The commentary on this area indicates this has been a particularly difficult area of law. *See* Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989); Comment, *Taking Issue With Takings: Has the Washington State Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991). This court's recent opinions in *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987) (*Orion* I), *cert. denied*, 486 U.S. 1022 (1988); and *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 112 L. Ed. 2d 238 (1990) have formulated a comprehensive state "regulatory takings" doctrine. Thus, this State's current rule on the law

of inverse condemnation has only recently taken shape, and both this case and that of *Sintra, Inc. v. Seattle*, *supra*, are opportunities for this court to apply recently adopted analysis.

In this case, the Robinsons allege the City's Housing Preservation Ordinance took private property without just compensation, and that enforcement of the Housing Preservation Ordinance violated their substantive due process rights. Since our treatment of the several issues on appeal is dependent upon a determination of whether these federal constitutional rights were violated, we address first the issues of the alleged taking and claimed substantive due process violation. The Robinsons' claims require an analysis of when, under state law, a substantive due process remedy and a takings remedy are available when land use regulations are alleged to be excessive. (This is so because in some instances the availability of relief under state law bears upon the accrual of a federal cause of action.) Our state law inquiry is controlled by this court's decision in *Presbytery of Seattle v. King Cy.*, *supra*. In *Presbytery*, we held the plaintiff had not satisfied exhaustion requirements before bringing an action, and thus this court did not have occasion to apply the test delineated in its decision.

After addressing the contended violations of constitutional rights under the *Presbytery* decision, we will address, in order, the propriety of the trial court's dismissal of the Robinsons' civil rights actions against the City and the individual officials, the refunds of payments to the Robinsons, the applicable limitation period for this type of action, and the claim for attorney fees against the City. Like handling fly paper, it is difficult to put down one piece of this review when picking up the next. Evaluation of one subject in this case impacts another issue that in turn raises another for evaluation and decision. For clarity in this involved opinion, we set forth the areas of law discussed separately, although they are interrelated.

Presbytery Analysis

[1, 2] Under our state regulatory takings jurisprudence, when a regulation results in a taking, the remedy is just compensation; and when the regulation violates substantive due process, the remedy is invalidation of the regulation. *Presbytery*, 114 Wn.2d at 331-32.[3]

However, we note that although under Washington law the remedy for claims that an ordinance violates substantive due process is invalidation, under certain circumstances a substantive due process claim for damages may still be lodged under federal law in state court through the state court's concurrent jurisdiction in section 1983 cases. *See generally* Bley, *Use of the Civil Rights Acts To Recover Money Damages for the Overregulation of Land*, 14 Urb. Law. 223 (1982); *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 Loy. L.A.L. Rev. 1205 (1990-1991); 1 S. Steinglass, *Section 1983 Litigation in State Courts* § 3.4 (Release 5 1990).

A. Threshold Inquiry.

[3] Under this court's decision in *Presbytery*, a land use regulation may be challenged either as an unconstitutional taking without just compensation or as a violation of substantive due process. 114 Wn.2d at 329. To determine whether a takings analysis is available, the first step is a threshold inquiry. This inquiry asks first whether the challenged regulation protects the public interest in health, safety, the environment or fiscal integrity. We contrast such police power regulation with a regulation that seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit. *Presbytery*, at 329. Second, we ask whether the regulation destroys or derogates any fundamental attribute of ownership: the rights to possess exclusively, to exclude others, and

[3]For clarity, we analyze these theories of relief separately: "These two constitutional theories are *alternatives* in cases where overly severe land use regulations are alleged. It is critical that these two grounds be separately considered and independently analyzed because the remedies for each of these types of constitutional violation are different." *Presbytery*, at 329.

to dispose of property. *Presbytery*, at 329-30. If the regulation does not destroy a fundamental attribute of ownership and does no more than protect the public health, safety, and welfare, then the regulation is not subject to a taking challenge. The challenged regulation is still subject to a substantive due process challenge for reasonableness. However, if the regulation *either* infringes upon a fundamental attribute of property ownership *or* goes beyond mere harm prevention to require a property owner to provide a public benefit, then that regulation is susceptible to a constitutional taking challenge. *Presbytery*, at 333.

B. Takings Analysis.

[4] Once a court determines that a regulation is vulnerable to a taking challenge, it engages in a "taking" inquiry. The court first determines whether the regulation substantially advances legitimate state interests. If the answer to this question is "no", then the regulation is a per se taking. *Presbytery*, at 333. If the regulation does substantially advance legitimate state interests, then the court next determines whether the plaintiff's challenge to the regulation is a facial challenge or an "as applied" challenge. If a plaintiff alleges the application of the regulation to *any* property is a taking, the challenge is a facial one. For facial challenges, no exhaustion of administrative remedies is required. *Presbytery*, at 333. However, if a plaintiff challenges the regulation as it applies to a specific parcel of property, the challenge to the regulation is "as applied". *Presbytery*, at 333. Exhaustion of administrative remedies is generally required for "as applied" challenges. *See Presbytery*, at 337, 338 & n.36; *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 80, 768 P.2d 462 (1989).

[5] For a facial challenge to succeed, "the landowner must show that the regulation denies all economically viable use of *any parcel* of regulated property in order to constitute a taking." (Italics ours.) *Presbytery*, at 333-34. A determination that a regulation denies all economically viable use of any given parcel of property "should prove to be a relatively rare occurrence." *Presbytery*, at 335.

In an "as applied" challenge (involving the application of the regulation to specific property), the court considers "(1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action." (Footnote omitted.) *Presbytery*, at 335-36. Once a court determines a taking has occurred, just compensation is mandated. *Presbytery*, at 337.

C. Substantive Due Process Analysis.

[6, 7] Even if a regulation is not susceptible to a taking challenge because it does not deny a fundamental attribute of property ownership and is purely an exercise of the police power designed to protect the public health, safety and welfare from harm, the regulation is still subject to substantive due process scrutiny for reasonableness. "The inquiry here must be whether the police power (rather than the eminent domain power) has exceeded its constitutional limits." *Presbytery*, at 330. The 3-prong due process test is applied, which inquires: (1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner. *Presbytery*, at 330; *see also West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986).

The first and second part of this test are often easily met by challenged government action. The third part is a more difficult determination. Accordingly, in *Presbytery*, this court adopted the following set of guidelines for the third inquiry for a determination that a regulation was "unduly oppressive":

> The "unduly oppressive" inquiry lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors for the court to consider to assist it in determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner.

Presbytery, at 331 (citing *Orion Corp. v. State*, 109 Wn.2d 621, 655 n.24, 747 P.2d 1062 (1987) (*Orion* II), *cert. denied*, 486 U.S. 1022 (1988). This court also has noted a set of nonexclusive factors for guidance in performing the "unduly oppressive" balancing test:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, at 331 (citing Stoebuck, San Diego Gas: *Problems, Pitfalls and a Better Way*, 25 Wash. U.J. Urb. & Contemp. L. 3, 33 (1983)).

If the regulation fails to meet any of the three prongs of the substantive due process analysis, then it is subject to invalidation. Under *Presbytery*, "[n]o compensation (which properly belongs with a 'taking' analysis) is warranted in the face of a due process violation." *Presbytery*, at 332. We repeat that a violation of a plaintiff's rights to substantive due process (that is, reasonable regulation) may under limited circumstances form the basis for independent *federal* statutory relief through a section 1983 action, which affords a damages remedy. The measure of these damages may differ from the "just compensation" measure.

D. Applying *Presbytery* to This Case.

[8] Applying the *Presbytery* analysis to this case, we begin with the threshold analysis, as the plaintiffs contend a taking occurred. The HPO regulated the demolition and removal from the market of housing units by landowners. Enforcement of the HPO did not destroy any fundamental rights of property ownership and did not constitute a permanent invasion of the property. We conclude, however, that the ordinance did go beyond preventing a harm, and required landowners to provide a public benefit in requiring

property owners to pay a fee or replace rental units lost before removing units or demolishing them. We have on an earlier occasion stated that the burden of providing this public benefit was one best borne by the community rather than by individuals:

> [T]he City may not constitutionally pass on the social costs of the development of the downtown Seattle area to current owners of low income housing. The problem must be shared by the entire city, and those who plan to develop their property from low income housing to other uses cannot be penalized by being required to provide more housing.

San Telmo Assocs. v. Seattle, 108 Wn.2d 20, 25, 735 P.2d 673 (1987). Having applied the threshold test, we conclude that this case is not beyond a taking challenge. We would distinguish our threshold determination in this case, however, from that which may result when the development of a particular piece of property would cause direct harm to the environment, such as the destruction of an irreplaceable wetland or shoreline ecosystem.

We therefore engage in a taking analysis and thus ask first whether the HPO advanced any legitimate state interests. *Presbytery*, at 333. The City persuasively contends that the housing replacement and tenant assistance provisions were substantially related to preserving low income housing and assisting tenants experiencing relocation hardships. We conclude the ordinance did advance legitimate state interests in the general welfare of the citizens of Seattle in attempting to preserve rental housing stock and assist low income tenants, and therefore was not a per se taking. *Presbytery*, at 333. Since the ordinance did advance legitimate state interests, it is necessary to look further and determine whether the Robinsons' challenge is facial or "as applied". *Presbytery*, at 333.

[9] The Robinsons' complaint contends the HPO was "facially invalid" and constituted a taking of whatever property to which it was applied, and therefore is a facial challenge. We therefore do not engage in an "as applied" analysis. In the case of a facial challenge, a taking will be

found only if the landowner shows the regulation denied all economically viable use of *any* regulated property. *Presbytery*, at 333-34. The Robinsons do not provide adequate basis for such an allegation, nor could they make this "relatively rare" showing, as the record indicates persons successfully developed some properties after paying the HPO license fees. We therefore hold the Robinsons' taking claim fails the *Presbytery* test for determining a challenged regulation is on its face a taking.

However, we may still proceed to analyze the Robinsons' claim that the City deprived them of substantive due process through enforcement of the HPO. The substantive due process analysis affords a different state law remedy and is independently undertaken. *Presbytery*, at 329. Even if a regulation is not a taking, it must nevertheless pass the 3-prong due process test for reasonableness. *Presbytery*, at 330. This court has observed that "many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'taking' formula." *Presbytery*, at 332-33.

Applying the substantive due process analysis to this case, we ask *first* whether the HPO was aimed at achieving a legitimate public purpose; *second*, whether the means used are reasonably necessary to achieve that purpose; and *third*, whether the HPO was unduly oppressive. *Presbytery*, at 330. The HPO had a legitimate public purpose and employed reasonable means to achieve it; we therefore conclude the HPO satisfies the first two prongs of the due process test for reasonableness. However, as this court has previously noted, "[t]he third inquiry will usually be the difficult and determinative one." *Presbytery*, at 331. In the third inquiry, we ask whether the HPO was unduly oppressive and conclude that it was. We are assisted by the following nonexclusive factors previously adopted by this court in balancing the interests of the City against those of the owners of property regulated by the HPO:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree

> to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, at 331 (citing Stoebuck, San Diego Gas: *Problems, Pitfalls and a Better Way*, 25 Wash. U.J. Urb. & Contemp. L. 3, 33 (1983)).

We review these nonexclusive factors in balancing the City's interests against the Robinsons'. The public problem of homelessness is certainly serious. The extent to which an owner's land or property particularly contributes to a public problem may in certain instances be determinative, such as in some environmental protection cases. However this factor is not particularly crucial in this action because these urban properties already have multiple potential uses. The problems of homelessness and a lack of low income housing in Seattle are in part a function of how all Seattle landowners are using their property. We further conclude that both the feasibility of less harsh means of achieving the City's purpose and the permanence of the nonzoning regulation in controlling the type of use of the landowner's property militate against the City. This court has already said of the HPO that solving the problem of the decrease in affordable rental housing in the city of Seattle is a burden to be shouldered commonly and not imposed on individual property owners. *San Telmo*, 108 Wn.2d at 25. We hold the HPO to be an unduly oppressive, and thus unreasonable, regulation. It therefore violated the rights of the Robinsons to substantive due process under our holding in *Presbytery*, at 331-32.

[10, 11] If an ordinance unduly oppresses a property owner and is struck down as violative of due process, then the law of this State provides a remedy of invalidation. *Presbytery*, at 331-32. The ordinance in this case, the HPO, has already been invalidated on other grounds. However, as a substantive due process violation is a deprivation of a

federal constitutional right, the Robinsons may also be entitled to seek a damages remedy under federal statutes. "Along with the vast majority of federal courts, we recognize that denial of a building permit . . . may give rise to a substantive due process claim" under 42 U.S.C. § 1983. *R/L Associates*, at 412. The plaintiffs' state law remedies are at this point complemented by the resort to 42 U.S.C. § 1983; federal relief in this instance picks up where state relief leaves off. Property rights, in addition to personal liberties, are within the protection of 42 U.S.C. § 1983. *Gibson v. Seattle (Wash.) Dep't of Police*, 472 F.2d 1220 (9th Cir. 1973). What must be proved by a section 1983 plaintiff may involve more than is necessary for establishing a right to relief under *Presbytery*. In many cases this means that burdens will be more difficult, but also that additional remedies will be available in section 1983 cases.

Before venturing further, we wish to reemphasize that "[m]ere regulation on the use of land has never constituted a 'taking' or a violation of due process under federal or state law." *Presbytery*, at 327. In the exercise of the police power regarding property use, such as in zoning and building permit requirements, government may legitimately impose many types of restrictions or development conditions on a landowner. An inexhaustive sampling of regulations would include building height, setbacks from the street, requirements for streets and access, dedication of easements for the public use, and creation of parks or green space in residential developments, and many environmental regulations. Impositions of these conditions, regulations, or restrictions are not per se violative of substantive due process or the taking clause.

Section 1983 Remedy

The Robinsons assign error to the trial court's ruling dismissing their section 1983 claims on summary judgment. They argue they are entitled to prevail on their section 1983 claims on the basis of a substantive due process violation committed by the City. The basis for this section 1983

substantive due process claim is the alleged violation of the plaintiffs' constitutional property rights by the City's unreasonable regulation of land use through enforcement of invalidated ordinance provisions. The Robinsons submit that imposition of an illegal condition on a land use permit, and the violation of a court order, deprived their class of substantive due process.

[12] State courts have concurrent jurisdiction in actions brought under 42 U.S.C. § 1983. *See Lange v. Nature Conservancy, Inc.*, 24 Wn. App. 416, 601 P.2d 963 (1979), *cert. denied*, 449 U.S. 831 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980). The trial court in the Robinsons' case dismissed their civil rights claims on summary judgment. The City argues the trial court dismissal should be affirmed, as the Robinsons failed to state a prima facie case for either inverse condemnation or a substantive due process violation.

[13] In considering an appeal from an order of summary judgment, this court engages in the same inquiry as the trial court. *Neubert v. Yakima-Tieton Irrig. Dist.*, 117 Wn.2d 232, 236, 814 P.2d 199 (1991). The reviewing court is to consider all the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Under CR 56(c), summary judgment is only appropriate

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

We accordingly review the Robinsons' action in light of the whole record in determining whether the City was entitled to judgment as a matter of law. The applicable law is 42 U.S.C. § 1983.

A. Basis for Section 1983 Complaint.

[14-16] 42 U.S.C. § 1983 is a remedial statute; it does not create any new substantive rights. Its function is to allow an avenue of redress to persons injured by the actions of

government which violate federal constitutional rights. Section 1983 has been used often as a means of redress when government land use regulation infringes upon federal constitutional or statutory rights through violations of the taking clause or of due process. *See* Bley, *Use of the Civil Rights Acts To Recover Money Damages for the Overregulation of Land*, 14 Urb. Law. 223, 225 n.12 (1982). 42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The main elements of a section 1983 action which a plaintiff must demonstrate to state a cause of action are: (1) a person has deprived the plaintiff of a federal constitutional or statutory right, and (2) that person acted under color of state law. *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989); *Brower v. Wells*, 103 Wn.2d 96, 104-05, 690 P.2d 1144 (1984). A municipality may be a "person" for purposes of section 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

[17] A municipality may be subject to suit under section 1983 of the federal civil rights statutes when that municipality acts through an ordinance. *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989). In addition, a municipality may be liable on a section 1983 civil rights claim when a city employee violates a federally protected right while executing a policy or ordinance officially adopted and implemented by city officials. *Learned v. Bellevue*, 860 F.2d 928 (9th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989). The plaintiffs in this case sued the City of Seattle, which may be recognized as a "person" under section 1983, as well as bringing action against several city employees in both their official and individual capacities. The Robinsons alleged a violation of their federal constitutional rights was

committed by the City and its employees acting pursuant to an ordinance (the HPO); and a municipality may be subject to section 1983 liability when it acts through an ordinance. *R/L Assocs.*, at 411-12.

We reject the City's contention that this court in *R/L Assocs.* held as a matter of law that Seattle's enforcement of the HPO could not give rise to a civil rights claim. As the Robinsons point out, this court simply did not consider that issue on appeal:

> While R/L pleaded a section 1983 claim, it made no allegation of irrational, or arbitrary or capricious conduct on the part of the City in its denial of R/L's demolition license. Moreover, this issue was not presented to or considered by the trial court, and will not be considered on appeal.

R/L Assocs., Inc. v. Seattle, at 412. The city action at issue in *R/L Assocs.* was the imposition of the HPO's tenant relocation assistance requirement upon the landowner prior to the time that particular provision of the HPO was declared facially invalid by the King County Superior Court. The Robinsons submit that by contrast, in their case they *do* plead arbitrary and capricious conduct, and that this case involves the enforcement of HPO provisions even *after* the time of the superior court decree ruling the provisions invalid. According to the Robinsons, the "strongest" evidence of irrationality in city action is the enforcement of the HPO *after* trial courts had held it invalid and enjoined further enforcement; *e.g.*, in one instance, a trial court ruling was followed by a press conference to the effect that the City would continue enforcement of the HPO against all but the successful plaintiffs in the action. *See R/L Assocs.*, at 411.

The City did continue enforcement of the HPO's various provisions after trial court declarations of invalidity. In *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987), this court affirmed a superior court ruling of invalidity, holding the HPO invalid as an unauthorized tax or fee on the development of land prohibited by RCW 82.02.020. *San Telmo*, at 23-24. Later, this court in *R/L Assocs.* held the

tenant relocation assistance provisions of the HPO also invalid. *R/L Assocs.*, at 411. This court went further, upholding the contempt ruling of the Superior Court entered against the City's officers for their continued enforcement of the tenant relocation assistance provisions after the provisions were ruled invalid. *R/L Assocs.*, at 411. In our opinion, we expressly rejected an argument by the City that a Superior Court's ruling of invalidity was binding on the City only as against the plaintiff to the action:

> [T]he City's argument would lead to the absurd conclusion that it is free to enforce the provisions of a facially invalid ordinance against the citizens of Seattle until and unless each aggrieved party brings its own action challenging the ordinance. This would lead to multiple and unnecessary litigation upon an issue in which the City has clearly been denied authority to proceed.

R/L Assocs., at 411. We went on to instruct the City further:

> The City observes that an injunction does not determine the rights and interests of persons who are not joined as parties. We agree. However, the City overlooks the fact that *it* is a party, and CR 65(d) provides that an order granting an injunction is binding *upon* the parties to the action and their officers and agents.

R/L Assocs., at 411. Finally, in affirming the order of contempt, we observed:

> The City's decision to continue to enforce the HPO was deliberate. Two days after issuance of the injunction in this case, the City issued a news release that the city attorney had advised the Department of Construction and Land Use to continue to enforce the tenant relocation requirements. The release stated that the City had been enjoined from enforcing this provision in one case. The courts need not tolerate this intentional violation of a valid judgment that prohibited the City from enforcing those provisions.

R/L Assocs., at 411.

B. Civil Rights Claim Against City Valid.

[18-20] A city cannot be held liable in damages for the mere enforcement of an unconstitutional or void ordinance in the nature of a police power regulation. *R/L Assocs.*, at 412. A land use decision denying substantive due process states a cause of action under section 1983 only if it is

invidious or irrational, *see R/L Assocs.*, at 412, or arbitrary, *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988). However, in this case we conclude that the Robinsons state a proper claim for violation of substantive due process under section 1983, and further that genuine issues of material fact remain. Therefore, the Robinsons' action should be allowed to proceed to trial for a decision on the facts. We so hold not merely because the City enforced an invalid or unconstitutional ordinance, but because the City *continued* to enforce ordinance provisions after they had been declared on separate, respective occasions to be invalid by trial courts.

We first consider whether the Robinsons adequately plead a violation of substantive due process for the purposes of section 1983. To successfully challenge a governmental action or regulation in a section 1983 action on substantive due process grounds, the plaintiff must plead and prove that the challenged government action is wholly arbitrary and capricious or irrational, or utterly fails to serve a legitimate purpose. *See Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 Loy. L.A.L. Rev. 1205, 1225 (1990-1991) (citing *Nelson v. Selma*, 881 F.2d 836, 839 (9th Cir. 1989); *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, 482 U.S. 906, *reh'g denied*, 483 U.S. 1040 (1987)). The Robinsons' allegation in the complaint that "Defendants have maliciously, recklessly, and/or wantonly" violated constitutional rights is sufficient to plead either "irrational or invidious" or "arbitrary and capricious" conduct as required.

A substantive due process claim does not require proof that all use of one's property has been denied. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1498 (9th Cir. 1987). Rather, the plaintiff must show that the interference with property rights was irrational or arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976). Where a plaintiff seeking section 1983

relief alleges that a municipality's land use authorities violated plaintiff's rights to substantive due process, the plaintiff bears the burden of demonstrating that the governmental action was arbitrary, irrational, or tainted by improper motive. *De Botton v. Marple Township.*, 689 F. Supp. 477, 481 (E.D. Pa. 1988). The plaintiff's complaint must allege facts that would support a finding of irrational or arbitrary action. *De Botton*, at 481 (citing *Pace Resources, Inc. v. Shrewsbury Township, supra*).

In *Pace Resources*, the court upheld the denial of the defendant's motion to dismiss the plaintiff's substantive due process claims since the plaintiff alleged facts from which a jury could conclude the municipality acted in an arbitrary or irrational manner in land use decisions. The court noted that although the town claimed its actions were taken in an entirely reasonable manner, this was a question that could be addressed at trial. *De Botton*, at 481.

[21] Property owners may also raise due process claims without first seeking just compensation through state court remedies. *Sinaloa Lk. Owners Ass'n v. Simi Vly.*, 882 F.2d 1398, 1404-05 (9th Cir. 1989) (amended opinion), *cert. denied sub nom. Doody v. Sinaloa Lk. Owners Ass'n, Inc.*, 494 U.S. 1016, 108 L. Ed. 2d 493, 110 S. Ct. 1317 (1990). A plaintiff is not required to seek compensation from a state entity before bringing a substantive due process claim because substantive due process is violated at the moment harm occurs; thus, the existence of postdeprivation state remedies does not bar a section 1983 action. *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (citing *Rutherford v. Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986)). In *Bateson*, the Ninth Circuit affirmed a district court finding that the Billings, Montana, city council's refusal to issue a building permit to the plaintiff after he had satisfied all permit requirements was an arbitrary and capricious act which denied Bateson substantive due process. The City points to distinctions between this case and *Bateson*, such as the fact that in *Bateson* the city council acted *contrary* to

the advice of counsel and singled out one individual for its conduct.

[22] Because a finder of fact could determine the City acted arbitrarily and capriciously in repeatedly continuing enforcement of the HPO, rather than seeking to stay the force or effect of rulings of invalidity and injunctions against enforcement, genuine issues of material fact remain to be determined. CR 56(c). This determination is for the finder of fact after hearing testimony and receiving evidence.

We hold the Robinsons properly stated a cause of action under 42 U.S.C. § 1983, having alleged their constitutional rights (to substantive due process) were violated by "persons" (the City of Seattle and its officials) acting under color of law (the Housing Preservation Ordinance). Their claim is based in an impairment of constitutional property rights caused by the City of Seattle's unreasonable, continued enforcement of a land use regulation previously invalidated by a trial court. As genuine issues of material fact remain to be decided, the trial court erred in dismissing the Robinsons' civil rights action against the City on summary judgment. The liability of the City to the Robinsons under section 1983, and to what degree possible civil rights damages are available, are matters to be determined in trial court.

Qualified Immunity

In the Robinsons' consolidated action from the Court of Appeals, they challenge the dismissal of their 42 U.S.C. § 1983 claims against the individual city officials who were also defendants in their personal capacities in the original suit. The officials being pursued in their individual capacities by the Robinsons are: William Justen, Holly Miller, and Beatrice Ryan, successive directors of the Department of Construction and Land Use; and Ovid Thompson, an officer responsible for enforcement of the HPO. The Robinsons contend the officials are not proper candidates for qualified immunity from liability, arguing that under *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727

(1982), the officials violated "clearly established rights" of which a reasonable person would have known.

The City contends that William Justen, Holly Miller, Beatrice Ryan and Ovid Thompson are entitled to qualified immunity because these officials enforced the HPO on the advice of counsel at a time when the land use doctrines on regulatory takings and substantive due process violations were in a state of change and uncertainty, with the rights of the Robinsons being not "clearly established". The City submits that the validity of the HPO was an issue on the cutting edge of land use regulatory law in the United States during the time the superior court rulings invalidating the HPO were entered. As support for this argument, the City cites several cases indicating that other jurisdictions have upheld police power regulations restricting the removal of rental units from the market in order to maintain a low income rental housing base in a city or restricting a landowner's rights to demolish property. *See Terminal Plaza Corp. v. City & Cy. of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986); *Help Hoboken Housing v. Hoboken, N.J.*, 650 F. Supp. 793 (D.N.J. 1986); *Nash v. Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984), *appeal dismissed*, 470 U.S. 1046 (1985); *Grace v. Brookline*, 379 Mass. 43, 399 N.E.2d 1038 (1979).

[23] Local government entities are not entitled to the qualified immunity available to their officials. *Owen v. Independence, Mo.*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980). Further, in contrast to the rule in section 1983 actions against municipalities, or against municipal officers sued in their official capacities, plaintiffs who bring *personal capacity* suits against officials need not establish a connection to governmental "policy or custom" in the defendant's actions. *Hafer v. Melo*, ___ U.S. ___ , 116 L. Ed. 2d 301, 112 S. Ct. 358, 361-62 (1991) (citing *Kentucky v. Graham*, 473 U.S. 159, 166, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)). Government officials performing discretionary functions, however, cannot be held personally liable for damages under section 1983 of the federal civil rights

statute unless their conduct violates clearly established federal constitutional or statutory rights; such persons are entitled to qualified immunity from a claim under section 1983 if their conduct is objectively reasonable when measured against clearly established law. *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Qualified immunity from suit must be granted when the law or right allegedly violated is not clearly established. *Conner v. Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990).

Qualified immunity protects government officials from insubstantial suits and harassing litigation while at the same time not foreclosing suits for damages which may be the only realistic avenue for the vindication of constitutional rights of the plaintiff. *Harlow v. Fitzgerald*, *supra* at 814. The standard for an official seeking the shield of the qualified immunity defense is an objective, and not a subjective, standard. *Anderson v. Creighton*, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). It is no defense to a section 1983 action that a defendant had no specific intent to cause a deprivation of civil rights. *United Steelworkers v. Milstead*, 705 F. Supp. 1426, 1436 (D. Ariz. 1988); *Gomez v. Toledo*, 446 U.S. 635, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980).

[24] Since qualified immunity entitles government officials to "an *immunity from suit* rather than a mere defense to liability" under *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), it is critical that insubstantial claims be resolved as quickly as possible. *Thorsted*, 858 F.2d at 575 (citing *Anderson v. Creighton*, 483 U.S. at 640 n.2). Thus, when available, the defendant's entitlement to qualified immunity may be established as a matter of law on a motion for summary judgment or for a directed verdict.

[25] Once the affirmative defense of qualified immunity has been raised in a case on a defendant's motion for summary judgment, the *plaintiff* bears the burden of demonstrating the existence of the allegedly "clearly established"

constitutional right. *See Mitchell v. Forsyth*, 472 U.S. at 526:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Regarding the "clearly established" standard, the Supreme Court has indicated that a certain degree of predictability is required:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at 640. *See Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 25, ___ P.2d ___ (1992). The City has pointed to cases in other jurisdictions upholding the constitutional validity of ordinances which the City convincingly argues are similar to the HPO in intent and effect. We are therefore persuaded that it was not "clearly established" when HPO-1 and HPO-2 were enacted that these regulations would violate substantive due process or other federal constitutional or statutory rights of persons owning the regulated property. Thus, while we have concluded that the ordinance in question violated substantive due process under *Presbytery*, this holding does not by itself lead to the conclusion that a section 1983 claim may proceed against the individual defendants. Rather, the substantive due process violation underlying this section 1983 action is the enforcement of HPO provisions *after* they were declared invalid on separate occasions. Therefore, we focus our inquiry on the question of whether enforcement of HPO provisions by city officials *after* such provisions had been declared invalid would violate "clearly established" rights.

[26] In the absence of binding precedent as to whether the conduct of officials violated clearly established statutory or constitutional rights of which a reasonable person would have known, a court should look to whatever decisional law is available to ascertain whether the law is "clearly established". *Capoeman v. Reed*, 754 F.2d 1512 (9th Cir. 1985).

There existed, at the time of the HPO enforcement, authority in our federal circuit denying immunity of any kind to officials who violate an order of a duly appointed administrative body, let alone a court of law, when the result of this violation implicated federal constitutional rights. In *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970), a case predating *Harlow*, officials disobeyed an administrative order directing reinstatement of an employee who had been discharged in violation of his First Amendment rights. The court reasoned that the administrative order was like a court order and said: " 'Obviously no immunity should be granted to the officials who wilfully disobeyed an order of court.' " *Donovan*, at 744 (quoting *Hoffman v. Halden*, 268 F.2d 280, 300 (9th Cir. 1959)).

[27] In general, the shield of qualified immunity does not extend to those officials who knowingly violate the law. *Mills v. Graves*, 930 F.2d 729 (9th Cir. 1991). Here, it is acknowledged by the City that "it may be clearly established that a knowing violation of a court order or administrative regulation violates substantive due process". Consolidated Appeal Brief of Respondents, at 39 (citing *Donovan v. Reinbold*, *supra*). The City, however, contends that while officials Miller and Thompson were held in contempt for violating a court order, this does not establish a *knowing* violation, since only an intentional, deliberate action which violates a court order is required for a finding of contempt, and knowledge that one is committing a violation is not required. *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 410-11, 780 P.2d 838 (1989). We do not deny qualified immunity to Miller and Thompson simply because they were found in contempt. The record in this case indicates all the individual defendants possessed actual knowledge of

court rulings invalidating the HPO and yet continued enforcement. By so doing, these officials exposed the City of Seattle and themselves to liability for unreasonable enforcement of land use regulations in violation of the plaintiffs' constitutional property rights.

The individual defendants maintain, however, that they only followed advice of the city attorneys. We note the Supreme Court has recently held that in the context of section 1983 actions prosecutors are not entitled to absolute immunity for legal advice given to police officers and has indicated that the *Harlow* objective standard applies to police conduct *without reference* to legal advice rendered by the prosecuting attorney:

> Although the absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, " '[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.' " . . . (quoting *Harlow*, 457 U.S., at 819, 102 S.Ct., at 2738). Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. Cf. *Butz* [*v. Economou*,] 438 U.S. [478], at 505-506, [57 L. Ed. 2d 895,] 98 S.Ct. [2894 (1978)]. Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.

Burns v. Reed, ___ U.S. ___, 114 L. Ed. 2d 547, 111 S. Ct. 1934, 1944 (1991).[4] It was suggested in *Donovan* that even the city attorney who advises disregard of a court order would also be liable rather than immune from suit. 433 F.2d at 744.

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[4] In contrast the prosecutor's participation in a probable cause hearing in *Burns* was held absolutely immune. *Burns*, 111 S. Ct. at 1942. The distinction is based on the function the prosecutor performs.

> [P]rosecutors are absolutely immune from liability under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case," . . . [*Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976)] 96 S.Ct., at 995, insofar as that conduct is "intimately associated with the judicial phase of the criminal process," . . . 96 S.Ct., at 995.

Burns, 111 S. Ct. at 1939.

In this case, the individual defendants, while officials of the City, continued to enforce provisions of the HPO after such provisions had been declared invalid by a court of competent jurisdiction. The record indicates that all of the individual defendants possessed actual knowledge of the superior court rulings invalidating the HPO. We find no basis for extending qualified immunity to the individual defendants in this case in the contention that they were acting pursuant to the advice of city attorneys in continuing to enforce the HPO provisions in spite of the superior court decisions. The city officials may very well have had the public welfare in mind in continuing enforcement of judicially invalidated HPO provisions, but intentional violations of court orders cannot be tolerated. At least one official stated in a deposition that it was his responsibility to continue enforcement of the HPO provisions even if he believed the ordinance to be unconstitutional. Regardless of an individual official's beliefs, a court's rulings which invalidate an ordinance and order a City to stop enforcement are to be obeyed. Respect for the rule of law is central to due process.

The trial court in this case erred in extending the shield of qualified immunity to the individual city officials for their enforcement of HPO provisions after respective provisions had been declared facially invalid by courts of competent jurisdiction and injunctions against continued enforcement had been entered.[5] Although we decline to extend qualified immunity to the individual defendants, the ultimate issue of their liability under section 1983 is a question which remains to be determined by the finder of fact.

We distinguish for elucidation the case of *Walnut Properties, Inc. v. Whittier*, 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). In *Walnut Properties*, a city attorney and city planning director were sued by an adult

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[5]We note that another court has declined to extend qualified immunity to section 1983 defendants by holding that disobedience of a court order was not a discretionary act entitled to immunity. *See Front Royal & Warren Cy. Indus. Park Corp. v. Front Royal, Va.*, 708 F. Supp. 1477 (W.D. Va. 1989).

theater after they recommended *reenactment* of the City's adult business zoning ordinance which had previously been ruled unconstitutional. While a prior district court opinion had ruled the earlier ordinance unconstitutional, a lack of circuit precedent on point demonstrated that the reenactment of the ordinance was not clearly established to be in violation of the plaintiff's rights, *when that reenactment followed a new counsel study with special findings which had been prepared*. Thus the city attorney and city planning director were held entitled to qualified immunity in that case. Since the City of Whittier had to reenact the ordinance in question, this indicates that contrary to the facts in the present case, the Whittier officials first *withdrew* their challenged ordinance from enforcement before advising the reenactment. Unlike the *Walnut Properties* case, the HPO provisions struck down by trial courts in this case were never withdrawn until this court spoke, not even during the time of the ordinance's redrafting after the first superior court declaration of invalidity in King County cause 83-2-06176-8 (Oct. 13, 1983). Nor did the City in this case seem to acknowledge the authority of the trial court by asking for a stay.

The longstanding rule for section 1983 actions in the Ninth Circuit is that an official who acts in knowing violation of an order of court is not entitled to qualified immunity when these same acts contribute to the basis of the plaintiff's section 1983 claim. The defendants in this case had actual notice of the court rulings of HPO invalidity. We therefore reverse the trial court grant of qualified immunity to the individual defendants and remand with instructions to reinstate those section 1983 substantive due process claims against individual defendants which are not time barred by the applicable statute of limitation discussed below.

We emphasize in this case the presence of *injunctive relief* precluding enforcement, as well as declarations of invalidity, and not merely an adverse ruling against the City. The City neither sought a stay nor appealed these rulings but

instead chose to continue enforcement in the face of court orders to the contrary.

VALIDITY OF REFUNDS OF HPO PAYMENTS

While the City submits that refunds of HPO payments were correctly restricted by the trial court to a 3-year statute of limitation period, the City alternatively argues on cross appeal that the trial court erred in refunding any moneys paid by the Robinsons prior to this court's decisions in *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987) and *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989).

A. Retroactive vs. Prospective Application.

The City contends the refunds the trial court awarded were based upon an improper retroactive application of the *San Telmo* and *R/L Assocs.* decisions which invalidated the HPO. To apply an appellate decision "retroactively" means to apply its holding to causes of action which arose prior to the announcement of the decision. Retroactive application of the *San Telmo* and *R/L Assocs.* decisions, the City submits, would be contrary to this court's decision in *National Can Corp. v. Department of Rev.*, 109 Wn.2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988).[6] The Robinsons argue that, to the contrary, the criteria stated by this court in *National Can* favor the trial court's award of refunds to the plaintiffs in this class action.

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[6] *National Can* dealt with the appropriateness of refunds of money collected pursuant to taxes invalidated on constitutional grounds. The United States Supreme Court had held Washington's multiple activities exemption to the state business and occupation tax discriminated against interstate commerce in violation of the commerce clause; and after vacating this court's decisions in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, 715 P.2d 123 (1986) and *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 732 P.2d 134 (1986), *vacated*, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987), remanded for a decision of the refund issues raised by the federal ruling:

> The decisive issues before this court are whether state law mandates refunds, and if not, whether this is an appropriate case for prospective application. We hold state law does not require refunds, and prospective application is appropriate.

National Can, 109 Wn.2d at 880.

In *National Can*, this court held the invalidation of a statutory taxing scheme does not automatically entitle a taxpayer to a refund. Before an HPO refund is allowed in this case, the City submits that under *National Can* this court must determine whether a refund (requiring retroactive application of the cases invalidating the HPO to the Robinsons' claims) is equitable. "Since Washington law does not foreclose an inquiry into prospective application, we turn to the factors enunciated by the United States Supreme Court to determine whether prospective application is to be afforded in this case." *National Can*, at 881. In making this analysis, the court in *National Can* utilized the following 3-factor approach:

> (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application.

National Can, at 881 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971)).

The City contends, citing the *Chevron Oil* analysis upon which *National Can* rests, that this case calls for prospective application of both the *San Telmo* and *R/L Assocs.* decisions. This is because those decisions established a new principle of law, and (1) this new principle was not clearly foreshadowed, (2) this new principle would not further the purposes of those two cases to apply their rules retrospectively, and (3) retroactive application of this new principle would be inequitable.

The Robinsons claim to the contrary that even if applicable, *National Can*'s analysis under the *Chevron Oil* rule favors retroactive application. The Robinsons argue they are entitled to refunds of payments made pursuant to the HPO, as neither their case nor the *San Telmo* or *R/L Assocs.* decisions involved the overruling of clear past precedent. As

to purpose, they add that neither the *San Telmo* nor the *R/L Assocs.* decisions limited recovery of fees to prospective application only, unlike the decision in *National Can*. The Robinsons finally argue they would be entitled to refunds even in the absence of the holdings of *San Telmo* and *R/L Assocs.*, as their suit relied on preexisting law, and note that their suit was filed before this court's decision in *R/L Assocs*.

Both parties to this action agree that the *Chevron Oil Co. v. Huson, supra,* analysis relied upon in *National Can* is relevant to our determination of whether the rules of our *San Telmo* and *R/L Assocs.* decisions should be applied retroactively. However, the United States Supreme Court has recently limited the *Chevron Oil Co. v. Huson, supra,* rule regarding retroactive application in the case of *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991).

B. *Beam Distilling* Rule.

Beam Distilling dealt with a challenge to a pre-1985 Georgia law imposing an excise tax on imported liquor at a rate double the rate imposed on liquor manufactured from Georgia-grown products. After the United States Supreme Court struck down a similar Hawaii law as violative of the commerce clause in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984), the *Beam Distilling* petitioner, a Kentucky bourbon manufacturer, then filed suit in Georgia state court seeking a refund of taxes it had paid under the Georgia law in 1982, 1983, and 1984. The Georgia trial court declared the Georgia statute unconstitutional, but refused to apply its ruling retroactively; and thus it would not allow a refund of taxes paid by the Kentucky bourbon manufacturer for 1982, 1983, and 1984. As support for this ruling, the trial court cited the rule of *Chevron Oil Co. v. Huson, supra,* that a decision will be applied prospectively when that decision displaces a principle of law on which the defendant may reasonably have relied, when retroactivity does not further the objectives of the new rule, and when the equities favor

prospective application. The State Supreme Court in Georgia affirmed the decision of the trial court. However, the United States Supreme Court reversed that decision and in a plurality held in favor of retroactive application of the *Bacchus* decision to the parties in *Beam Distilling*. 115 L. Ed. 2d at 491.

[28] Justice Souter delivered the opinion of the court in *Beam Distilling*. It states that the question of whether a newly announced rule of an appellate decision should apply retroactively is a choice of law question for which there are three possible answers. The first possible choice of law approach is to apply a new rule *completely retroactively*:

> First, a decision may be made *fully retroactive*, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. *This practice is overwhelmingly the norm* . . . and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law.

(Italics ours.) *Beam Distilling*, 115 L. Ed. 2d at 488. The second choice of law approach is to apply the new rule *completely prospectively*:

> Second, there is the *purely prospective method* of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision. *This Court has, albeit infrequently, resorted to pure prospectivity* . . . although in so doing it has never been required to distinguish the remedial from the choice-of-law aspect of its decision. . . . This approach claims justification in its appreciation that "[t]he past cannot always be erased by a new judicial declaration," . . . and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness. But this equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures.

(Italics ours.) *Beam Distilling*, 115 L. Ed. 2d at 488-89. The third choice of law approach, "*selective prospectivity*",

involves applying the new rule to the parties in the case announcing the new rule, but otherwise to apply the new rule prospectively:

> Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. *This method, which we may call modified, or selective, prospectivity,* enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. . . .
>
> But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally. . . . For this reason, we abandoned the possibility of selective prospectivity in the criminal context in Griffith v. Kentucky, 479 US 314, 328, 93 L Ed 2d 649, 107 S Ct 708 (1987), even where the new rule constituted a "clear break" with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review. Though Griffith was held not to dispose of the matter of civil retroactivity, see id., at 322, n 8, 93 L Ed 2d 649, 107 S Ct 708, *selective prospectivity appears never to have been endorsed in the civil context.*

(Citations omitted. Italics ours.) *Beam Distilling*, 115 L. Ed. 2d at 489-90.

After reviewing the three approaches to the choice of law question, Justice Souter frames *Beam Distilling* as presenting one issue: whether the selective prospectivity approach, no longer available in the criminal context, is available in the civil cases. *Beam Distilling*, 115 L. Ed. 2d at 490. The plurality in *Beam Distilling* holds that selective prospectivity is not available in the civil context. The opinion concludes that *once the Supreme Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata*: "Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and stare decisis here prevailing over

any claim based on a Chevron Oil analysis."[7] *Beam Distilling*, 115 L. Ed. 2d at 491.

Thus, the Supreme Court in *Beam Distilling* held that since its decision in *Bacchus* did not reserve the question of retroactive application and remanded the case for consideration of remedial and refund issues, the Supreme Court was itself later barred from denying retroactive application of the *Bacchus* rule to other subsequent litigants whose causes of action also arose prior to the *Bacchus* decision. This was held in spite of the fact that, by all accounts, the *Bacchus* decision clearly overruled existing past precedent.

Beam Distilling's limitation on *Chevron Oil* is not implied, but express:

> To this extent, our decision here does limit the possible applications of the Chevron Oil analysis, however irrelevant Chevron Oil may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case. . . . *Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application.* The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.

(Italics ours.) *Beam Distilling*, 115 L. Ed. 2d at 493. The *Beam Distilling* decision has effected a limitation on the *Chevron Oil* analysis, which both parties in this case have

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[7]Justice Stevens joined in Justice Souter's opinion. Justice White concurred in the judgment, but reasserted the validity of the "pure prospectivity" approach he argued was called into question by Justice Souter's opinion. 115 L. Ed. 2d at 494-95. Justices Blackmun, Marshall and Scalia concurred in the judgment, but favored abandonment of *any* prospectivity approach on constitutional grounds: "Unlike a legislature, we do not promulgate new rules to be applied prospectively only,' . . . We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce. . . . [P]rospectivity, whether 'selective' or 'pure,' breaches our obligation to discharge our constitutional function." 115 L. Ed. 2d at 496 (Blackmun, J., concurring). Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, dissented.

argued must be considered to the extent it was relied on in our *National Can* decision.

To state it another way, under *Beam Distilling*, *retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule*. Such selective, or "modified", prospectivity would be unequal and unmindful of stare decisis as it treats similarly situated litigants unequally.[8] *Beam Distilling*, 115 L. Ed. 2d at 493. We are persuaded that the *Beam Distilling* holding is sound. While our decision in *National Can* relied in part on the *Chevron Oil* analysis, we now modify our rule from *National Can* in a manner consistent with the limitations on the *Chevron Oil* rule effected in *Beam Distilling*. We expressly limit our holding in this case to the abolishment of selective prospectivity in the application of our state appellate decisions.

C. Applying *Beam Distilling* to This Case.

In accordance with *Beam Distilling*, as we have noted, once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements, such as the statute of limitation or res judicata. We begin by recognizing that our decisions in *San Telmo* and *R/L Assocs.* have established, while invalidating HPO provisions, that the plaintiffs in those cases were entitled to the benefit of those holdings. In *R/L Assocs. v. Seattle*, 113

[8] In announcing the decision of the court, Justice Souter's opinion states: "We do not speculate as to the bounds or propriety of pure prospectivity", thus reserving the Court's opinion as to the validity of dispositions in which the Court in making a new rule does not apply it to the litigants in the case announcing the new rule. 115 L. Ed. 2d at 493. But apparently the *Beam Distilling* decision has called into question the viability of *any* rules of prospective application under *Chevron Oil Co. v. Huson*, *supra*:

> Justice Souter purports to have restricted the application of Chevron Oil only to a limited extent. The effects appear to me far greater. . . . The inquiry the Court summarized in Chevron Oil represents longstanding doctrine on the application of nonretroactivity to civil cases. Justice Souter today ignores this well-established precedent, and seriously curtails the Chevron Oil inquiry.

(Citations omitted.) 115 L. Ed. 2d at 499 (O'Connor, J., dissenting).

Wn.2d 402, 780 P.2d 838 (1989), this court stated: "Because we hold the tenant assistance provisions invalid, R/L is entitled to a refund of the fees already paid to comply with the provisions." 113 Wn.2d at 411. Similarly, the plaintiffs in *San Telmo* were relieved of the requirement of building replacement housing or paying housing replacement fees. The City incorrectly argues the refund in *R/L Assocs.* was not retroactive, as the plaintiff R/L Associates had challenged the fee and only paid into the court's registry to continue its court action. 113 Wn.2d at 405. However, in *National Can*, this court stated: "Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application."[9] *National Can*, 109 Wn.2d at 891.

We have observed that this court's *San Telmo* and *R/L Assocs.* decisions were applied to the parties in those actions. The City argues that the *San Telmo* and *R/L Assocs.* decisions should not be applied to cases arising on facts predating the pronouncement of those decisions, even though those decisions were applied to the parties in those cases. We may conclude then that the City is asking for this

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[9]This rule for defining retroactivity is consistent with the distinctions drawn in *Beam Distilling* between "pure" prospective application and "modified" or "selective" application. "Pure" prospective application (not expressly eliminated as an option by *Beam Distilling*) requires the new rule be applied "neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision." *Beam Distilling*, 115 L. Ed. 2d at 488. On the other hand, "modified" or "selective" prospectivity (expressly eliminated as an option in civil cases by *Beam Distilling*) is manifested when "a court [applies] a new rule in the case in which it is pronounced, then return[s] to the old one with respect to all others arising on facts predating the pronouncement." *Beam Distilling*, 115 L. Ed. 2d at 489.

The assertion that the *R/L Assocs.* invalidation was not applied retroactively because the plaintiff had challenged the fee and only paid into the court's registry in order to continue its court action fails. According to the *Beam Distilling* definition, the City cannot argue at this point for a purely prospective application of the *San Telmo* and *R/L Assocs.* decisions *because the rules announced in those cases were applied to the parties in those law-making decisions*. The *R/L Assocs.* and *San Telmo* decisions were retroactively applied, as it does not matter that the parties in those cases had not actually paid fees to the City before challenging the ordinances in question.

court to apply those decisions in a selectively prospective manner, an approach we decline to follow.

The City further contends it is unfair to grant refunds to plaintiffs who paid fees, did not challenge the HPO, and now sue based on the benefit of hard-fought battles won by others. It argues that in this case, unlike the case in *R/L Assocs.*, no class member challenged the ordinance fees and "[a]s far as the record shows, they paid their fees willingly and went on to build successful projects." Brief of Respondent-Cross Appellant, at 45. *Beam Distilling* addresses precisely this question of whether it is fair to allow parties who have not challenged a tax or fee regime to then, after an invalidation of a tax or fee, ride the coattails of successful challengers into court and enjoy the fruits of the labors of those who have struggled to defeat existing laws:

> [T]he petitioner now before us . . . did not challenge the Georgia law until after its fellow liquor distributors had won their battle in Bacchus. . . . Insofar as equality drives us, it might be argued that the new rule . . . should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.
>
> . . . As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant. We might, of course, limit retroactive application to those who at least tried to fight their own battles by litigating before victory was certain. To this possibility, it is enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.

(Citations omitted.) *Beam Distilling*, 115 L. Ed. 2d at 492-93. We agree.

We hold that refunds were properly available in this case, pursuant to an alternative theory of relief independent of a civil rights action, as the decisions of this court in *San*

Telmo and *R/L Assocs.* were properly applied retroactively. The practice of retroactive application is "overwhelmingly the norm". *Beam Distilling*, 115 L. Ed. 2d at 488. Furthermore, under the *Beam Distilling* holding which we adopt, there is no balancing the equities to determine whether we should now apply rules which were applied retroactively in the *San Telmo* and *R/L Assocs.* decisions prospectively to the parties in this case:

> Nor, finally, are litigants to be distinguished for choice-of law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the Chevron Oil analysis . . . Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case.

Beam Distilling, 115 L. Ed. 2d at 493. We accordingly affirm the trial court award of refunds.

As to any property owners who may be present in the class who paid HPO fees pursuant to ordinance provisions *prior* to the invalidation of those provisions, such plaintiffs' remedies lie solely in refund relief, since there will be no initial showing of arbitrary and capricious conduct necessary for a section 1983 action. The right to refund relief is subject to the statute of limitation for refund actions, discussed below. By contrast, property owners who were assessed fees *after* trial court invalidation of applicable ordinance provisions may pursue damages remedies under section 1983, subject to the applicable limitations period for such actions in Washington.

Applicable Statute of Limitation

In determining the applicable statute of limitation for this case, we address the proper limitations period not only for the trial court's grant of HPO payment refunds under

RCW 4.16.080(3), but also to what extent such considerations impact the Robinsons' section 1983 claims.

The trial court in this case imposed a 3-year statute of limitation on the Robinsons' class claims, meaning that all class claims arising more than 3 years prior to the date the action was filed, May 1988, were time barred.

The Robinsons argue that no statute of limitation applies to their claims for compensation because it is an inverse condemnation action and that actions against the government for the taking or damaging of property are not time barred. They submit the trial court erred when it applied a 3-year limitation period by characterizing their claims as a refund action for invalidly imposed taxes or charges in reliance on *Hart v. Clark Cy.*, 52 Wn. App. 113, 758 P.2d 515 (1988). Alternatively, they argue that the 6-year statute of limitation, available in actions for lost rents and profits for the use and occupation of real estate, would be "preferable". Furthermore, argue the Robinsons, the City ought to be equitably estopped from asserting a statute of limitation defense at all.

A. Equitable Estoppel Rejected.

We address first the Robinsons' equitable estoppel argument as it attacks the ability of the City to even assert the defense. The Robinsons rely on a statement in *Hart v. Clark Cy.*, *supra*, that the County in that case collected its fees in *good faith* and thus was not estopped from asserting the statute of limitation. By contrast, the Robinsons argue, in this case the City knew the HPO was invalid and therefore should be estopped. The *Hart* court noted that estoppel is available to prevent a defendant from raising a statute of limitation defense where the defendant has fraudulently or inequitably invited a plaintiff to forebear from commencing suit until the applicable statute of limitation has run, barring the plaintiff's action. *Hart*, at 119. The court in *Hart* did not apply the estoppel doctrine, however, because the requisite showing was not made. Nor have the Robinsons made the required showing in this case.

[29, 30] Equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703, *review denied*, 108 Wn.2d 1037 (1987). The elements to be proved are: first, an admission, statement, or act inconsistent with a claim afterward asserted; second, action by another in reasonable reliance on that act, statement, or admission; and third, injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Board of Regents of UW v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). Estoppel is appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has "*fraudulently* or *inequitably* invited a plaintiff to delay commencing suit until the applicable statute of limitation has expired." *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986). The Robinsons do not argue or show that the City or any of its officials in any way invited any member of the Robinsons' class to delay filing suit. The existence of earlier decisions in this court upholding lower court challenges to the HPO bears testament to the fact that while the Robinsons and their class relented, others did bring suit. Because the City did nothing to induce delay in the filing of this action, we reject the plaintiffs' equitable estoppel argument.

B. 6-Year Limitation Period Inapplicable.

The Robinsons alternatively contend the 6-year statute of limitation period which governs actions "for the rents and profits or for the use and occupation of real estate" under RCW 4.16.040(3) is "preferable". This statute's limitation period is not applicable. The HPO requirement that owners replace housing or pay into the housing replacement fund cannot be equated with a dispute over rents or profits or the occupation of land; furthermore, the Robinsons cite no authority which would compel such an equation. We therefore reject the Robinsons' suggested statute of limitation preference.

C. RCW 4.16.080(3) Applicable to Refunds.

[31] While the trial court's order does not expressly cite the basis for the court's conclusion that a 3-year limitation period is applicable, both parties appear to agree that the trial court relied upon *Hart v. Clark Cy.*, 52 Wn. App. 113, 758 P.2d 515 (1988). In *Hart*, the 3-year limitation period of RCW 4.16.080(3) was applied to an action for refund of money paid pursuant to a county ordinance, later held to impose an invalid tax, which required park development fees. Following this court's decision in *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wn.2d 804, 650 P.2d 193 (1982), the County in *Hart* ceased imposing the fees and the plaintiffs filed suit. By affirming the trial court's application of the 3-year statute of limitation, the Court of Appeals in *Hart* barred the majority of the plaintiffs' claims. The court characterized the action as one based partly on an implied liability to repay money unlawfully received, and partly upon a theory of unjust enrichment, both theories subject to application of a 3-year statute. *Hart*, 52 Wn. App. at 116, 118. RCW 4.16.080(3) limits actions to 3 years for "an action upon a contract or *liability*, express or *implied*, which is not in writing, and does not arise out of any written instrument". (Italics ours.)

The court in *Hart* relied on decisions in which this court had applied the 3-year limitation period to refund actions for invalid taxes:

> The Washington Supreme Court has applied RCW 4.16.080(3) to refund actions for invalid taxes. In *Corwin Inv. Co. v. White*, 166 Wash. 195, 6 P.2d 607 (1932), the court stated that "[a]n action against a county to recover void taxes is one which arises upon an implied contract, not in writing, and the three-year statute of limitations applies." . . . The underlying principle for the application of the 3-year statute of limitations is that suits seeking tax refunds "are actions arising out of implied liabilities to repay money unlawfully received . . ." *Adams Cy. v. Ritzville State Bank*, 154 Wash. 140, 144, 281 P. 332 (1929).
>
> In the present case, the trial court properly applied the 3-year statute of limitations. The Supreme Court in *Hillis Homes* ruled that the fees imposed upon residential developments constitute taxes for which there had been no express

> grant of authority by the State Legislature. Therefore, these fees are "without authority and invalid." *Hillis Homes*, 97 Wn.2d at 808.

Hart, 52 Wn. App. at 115-16. We observe that in the Brief of Appellants, at 21, it is stated: "Here the City is improperly holding fees involuntarily paid under an invalid ordinance for real property development". This characterization of the Robinsons' demand for recovery is entirely consistent with the theory in *Hart*. Accordingly, we hold that to the extent relief is available to the plaintiffs on a basis other than the federal statutory civil rights relief of section 1983 (*i.e.*, if the plaintiffs are unsuccessful in their section 1983 action or seek refunds for payments made prior to declarations of ordinance invalidity), the 3-year statute of limitation of RCW 4.16.080(3) properly applies to the Robinsons' claims.

D. Inverse Condemnation Claims.

The Robinsons contend their action does not merely involve collection of invalid taxes or fees, but also interference with the use and enjoyment of property. They claim *Hart* does not apply, or should be limited or overruled, because governmental taking or damaging of property is of constitutional magnitude, so that mere passage of time cannot bar such a claim. In support of this contention they cite *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980) and *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). In those cases plaintiffs brought inverse condemnation actions against the Port of Seattle seeking compensation for increased noise at Seattle-Tacoma International Airport. This court held the claims were not subject to any time bar save the 10-year period for prescriptive right acquisition. *Petersen*, at 483; *Highline Sch. Dist.*, at 11. We have already concluded that this action is not one in inverse condemnation, as no taking has been established under this court's rule in *Presbytery*. Therefore, we do not engage in the analysis offered in reliance upon the *Petersen* and *Highline Sch. Dist.* cases.

In analyzing the Robinsons' section 1983 substantive due process claim, we have concluded that to the extent they

can show that the continued enforcement of respective HPO provisions (after trial court declarations of invalidity and injunctions against continued enforcement) was arbitrary and capricious, the Robinsons can maintain a federal cause of action under 42 U.S.C. § 1983. We must therefore address the applicable limitation period for the Robinsons' claims to federal relief for violations of substantive due process.

E. Limitation Period for Section 1983 Claims.

[32] The Robinsons stated a prima facie case for civil rights relief for their claims of substantive due process violations. Since these claims were improperly dismissed and may now be set for trial, the Robinsons have a valid theory of relief other than "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" under RCW 4.16-.080(3). We therefore seek the applicable limitation period for what may stand as an independent theory of relief, *i.e.*, the Robinsons' substantive due process claims under section 1983. We note that damages, if awarded, could differ in amount from refunds. Because there is no statute of limitation for section 1983 actions, federal courts formerly used the state statute of limitation applicable to a similar cause of action under the law of the State in which the action arose, as provided in *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980). This rule was changed by the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 276, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985), in which it was held that the appropriate statute of limitation for section 1983 actions is the same as the forum state's limitations period for personal injury cases. *See Krug v. Imbordino*, 896 F.2d 395 (9th Cir. 1990). Thus federal precedent under the *Wilson v. Garcia, supra,* rule requires the use of a single limitation period for section 1983 actions in each state. The Supreme Court has stated that courts entertaining section 1983 actions may in certain instances employ the general or residual state statute of limitation for personal injury actions. *Owens v. Okure*, 488 U.S.

235, 249-50, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989). However, this is only when state law provides multiple statutes of limitation for personal injury actions:

> Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal injury actions.

Owens v. Okure, 488 U.S. at 250 n.12. *See* 1 S. Steinglass, *Section 1983 Litigation in State Courts* § 6.6(d) (Release 2 1989); *see also* Kibble-Smith, *Statutes of Limitation and Section 1983: Implications for Illinois Civil Rights Law*, 20 J. Mar. L. Rev. 415 (1986-1987).

The statute of limitation for personal injury actions in the state of Washington is 3 years under RCW 4.16.080(2). This 3-year period was held applicable to *Bivens* claims, *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), arising in the state of Washington in *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989). Thus the 3-year limitation period for personal injuries under Washington law applies to this section 1983 action.

1. *Accrual of Cause of Action.*

[33] The next question to be addressed is when the Robinsons' substantive due process cause of action (in this instance, a class suit) accrued. While state law requires the use of state policies on *tolling* and revival of statutes of limitation, federal law controls the question of when a cause of action *accrues* when we discuss statutes of limitation for section 1983 purposes. *Norco Constr., Inc. v. King Cy.*, 801 F.2d 1143, 1145 (9th Cir. 1986). *See also* 1 S. Steinglass, at 6-37; *Chardon v. Fernandez*, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981) (section 1983 claim accrued when a plaintiff knew or should have known of the injury that was basis of suit). In *Norco Constr.*, it was held that a developer's civil rights action against King County based on the County's delay in acting on the developer's preliminary plat application accrued when the County made its final

decision approving the application rather than when the developer became aware the County had treated it differently and would not act within the period provided by statute.

We note that in the land use context, it has been observed that other land use claims may be stated independent of a taking claim, and it is possible for section 1983 due process or other nontaking claims to accrue earlier than taking claims; taking claims entail more stringent ripeness requirements.[10] S. Steinglass, at 6-39. There has been considerable controversy on whether the ripeness requirements for takings claims announced in *Williamson Cy. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985) and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986) are applicable as an impediment to related, nontaking claims on the grounds that such claims have not yet accrued until taking claims are ripe. *Williamson* held that a Fifth Amendment taking claim is not ripe (and thus a cause of action does not accrue) until the landowner has sought and received a final judgment on state compensation procedures. *Williamson*, 473 U.S. at 194-95. However, the Ninth Circuit has held that the *Williamson* requirement that a federal takings plaintiff exhaust his or her state law remedies prior to bringing a claim did not extend to the plaintiff's claims that he or she had been denied due process by the same state action. *Sinaloa Lk. Owners Ass'n v. Simi Vly.*, 882 F.2d 1398, 1404-05 (9th Cir.

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[10]"The application of [the] federal accrual policy to §1983 land use litigation depends upon the nature of the claim being advanced. For example, in a §1983 inverse condemnation [*i.e.*, taking] action a property owner is challenging not simply the regulatory taking but also the failure of the governmental entity to provide just compensation. Thus, in *McMillan v. Goleta Water District* [792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987)], the Ninth Circuit relied on the ripeness requirement applied by the Supreme Court in taking claims to conclude that the §1983 taking claim did not accrue either when the Water District imposed a moratorium on new water connections (and thus interrupted the property owners' water service) or when it became clear that the interruption was not temporary. Rather, the action accrued almost ten years later when the Water District denied the property owners' formal application for an exception to the moratorium." (Footnotes omitted.) 1 S. Steinglass, at 6-38.

1989), *cert. denied sub nom. Doody v. Sinaloa Lk. Owners Ass'n, Inc.* 494 U.S. 1016, 108 L. Ed. 2d 493, 110 S. Ct. 1317 (1990). In *Sinaloa*, the Ninth Circuit concluded that landowners' substantive due process claims arising out of the State's breaching of a privately owned dam and destruction of a lake was ripe, notwithstanding the fact that the landowners' failure to exhaust state law remedies had precluded their federal taking claims. *Sinaloa*, 882 F.2d at 1407. The *Sinaloa* decision was cited as consistent with the Ninth Circuit's decision in *Kaiser Dev. Co. v. Honolulu*, 898 F.2d 112, 113 (9th Cir. 1990). The *Kaiser* decision relied totally on the reasoning from *Kaiser Dev. Co. v. City & Cy. of Honolulu*, 649 F. Supp. 926 (D. Hawaii 1986), in which it was noted that the *Williamson* and *Yolo* concepts of ripeness and exhaustion do not preclude a plaintiff's claim that arbitrary and capricious state action violated substantive due process. 649 F. Supp. at 943 n.24.

[34] Substantive due process claims differ from taking claims in that the plaintiff who has suffered a violation need not wait for the State to deny an adequate postdeprivation remedy before commencing suit. Substantive due process is violated at the moment harm occurs; thus, the existence of postdeprivation state remedies does not bar a section 1983 action. *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (citing *Rutherford v. Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986)).

2. *Continuing Wrong Theory Inapplicable.*

It is also noted in commentary that some federal courts have considered tolling the running of, or delaying the accrual of, the statute of limitation in section 1983 land use actions under the "continuing wrong" theory. *See* 1 S. Steinglass, § 6.6(d) (citing *Ocean Acres Ltd. Partnership v. Dare Cy. Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983); *Gordon v. Warren*, 579 F.2d 386, 391 (6th Cir. 1978); *De Botton v. Marple Township*, 689 F. Supp. 477, 480 (E.D. Pa. 1988); *Moore v. Costa Mesa*, 678 F. Supp. 1448, 1449 (C.D. Cal. 1987); *Jackson v. City Coun.*, 659 F. Supp. 470, 474-75 (W.D. Va. 1987), *aff'd in part, vacated in part on other grounds,*

840 F.2d 10 (4th Cir. 1988)). There is a split among jurisdictions as to the function and availability of the continuing wrong theory.

[35] However, the Ninth Circuit has rejected this theory in the regulatory taking and land use context. *See Azul Pacifico, Inc. v. Los Angeles*, 948 F.2d 575, 584 (9th Cir. 1991); *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991). Since the Ninth Circuit has not embraced the continuing wrong theory, it is not available in this case.

The policy behind statutes of limitation is to ensure essential fairness to defendants and to bar plaintiffs who have "slept on [their] rights." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965). The plaintiffs in this case did not bring state actions prior to raising their federal claims so as to toll the statute of limitation during the pendency of their state court proceedings. The nature of the wrongful conduct alleged in this section 1983 action is the enforcement of respective HPO provisions after trial courts had declared them invalid and issued injunctions against continued enforcement. Insofar as the section 1983 claim is concerned, the federal substantive due process rights of the respective class members, if violated, were violated at the instant this improper enforcement came to bear upon each of them. We are therefore not persuaded that this case presents a "continuing wrong" vis-a-vis the respective class members.

In this case the respective class members' section 1983 causes of action accrued (*i.e.*, substantive due process was violated by allegedly arbitrary and capricious conduct) when they were assessed fees by the City pursuant to the HPO, as a requirement for obtaining a license, after the applicable provisions of the ordinance had been declared invalid by trial courts and further enforcement had been enjoined.

[36] We hold that the moment of imposition of fees pursuant to invalidated HPO provisions by the City against each of the respective class members as a condition of removing low income housing gave each respective class

member a basis for asserting a section 1983 substantive due process claim against the City. The 3-year statute of limitation began running on each of these respective claims at the moment of fee imposition, which was the moment the respective causes accrued.

We accordingly hold that since the 3-year statute of limitation applies, all section 1983 claims by class members which arose prior to the period of 3 years before May 27, 1988, the date of the filing of the complaint, are time barred.

Attorney Fees

Due to the fact that the dismissal of the Robinsons' action under section 1983 has been reversed and the cause may proceed to trial, it is not necessary at this time to address the issue of attorney fees.

CONCLUSION

We remand this case to the trial court for determination of the liability of individual defendants and the liability of the City of Seattle under the plaintiffs' section 1983 substantive due process claims, and to decide to what degree civil rights damages, if awarded, would differ or exceed refunds validly awarded the Robinsons. The question of attorney fees must await the settlement, or the outcome, of the reinstated civil rights action.

DORE, C.J., and UTTER, BRACHTENBACH, DOLLIVER, ANDERSEN, DURHAM, SMITH, and JOHNSON, JJ., concur.

THE SUPREME COURT OF WASHINGTON

NO. 57038-8

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and the class of persons and entities similarly situated,

Appellants,

v.

THE CITY OF SEATTLE, a municipal corporation,

Respondent,

WILLIAM JUSTEN and JANE DOE JUSTEN, husband and wife; BEATRICE RYAN and JOHN DOE RYAN, wife and husband; HOLLY MILLER and JOHN GAYMAN,wife and husband; and OVID THOMPSON, a single person,

Defendants.

[Filed February 4, 1991]

ORDER

This matter came before Department One of this court for preliminary consideration on February 4, 1991.

IT IS HEREBY ORDERED:

(1) The appeal will be retained for rehearing on the merits by this court;

(2) The related appeal now pending in Division One of the Court of Appeals under cause No. 24177-0 is transferred to this court and consolidated with this case;

(3) The case will be scheduled for oral argument as a companion to *Sintra, Inc., et al. v. Seattle, et al.*, cause No. 57029-9, on a date to be set later.

February 4, 1991

/s/ Fred Dore
CHIEF JUSTICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CLASS ACTION

NO. 88-2-09850-6

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, WILLIAM JUSTEN and JANE DOE JUSTEN, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband, HOLLY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person,

Defendants.

NOTICE OF APPEAL TO STATE SUPREME COURT

Roy W. and Kathleen Robinson husband and wife, individually and as partners d/b/a Computer Slide Company and that class of persons and entities similarly situated, plaintiffs, seek review by the Supreme Court of the State of Washington of the Final Judgment that was entered on February 28, 1990 as well as the Order Denying Attorney Fees entered on March 21, 1990 by the trial court.

DATED: March 22, 1990.

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/s/ Richard B. Sanders
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WSBA No. 2813

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CLASS ACTION
NO. 88-2-09850-6

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, WILLIAM JUSTEN and JANE DOE JUSTEN, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband, HOLLY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person,

Defendants.

NOTICE OF APPEAL TO STATE SUPREME COURT

The City of Seattle, defendant, seeks review by the Supreme Court of the State of Washington of the final judgment entered on February 28, 1990.

DATED this 9th day of April, 1990.

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Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CLASS ACTION
NO. 88-2-09850-6
FINAL JUDGMENT
(Clerk's Action Required)

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, WILLIAM JUSTEN and JANE DOE JUSTEN, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband, HOLLY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person,

Defendants.

[Filed February 28, 1990]

JUDGMENT SUMMARY

1. Judgment Creditors:	Roy W. and Kathleen Robinson, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated.	
2. Judge Debtor:	The City of Seattle, a municipal corporation.	
3. Principal Judgment Amount:		$ 430,271.47
4. Attorney Fees:		$ 125.00

5. Costs: $ To be taxed
6. Other Recovery Amounts: $ None
7. Principal Judgment Amount and Attorney Fees Shall Bear Interest at 12% per annum.
8. Costs Shall Bear Interest at 12% per annum from the date of taxation.
9. Attorney for Judgment Creditors: RICHARD B. SANDERS

The undersigned Judge of the above-entitled court being fully apprised of the premises herein, finding that all remaining factual issues have been resolved by stipulation entered February 28, 1990 and further finding that entry of final judgment is now appropriate this court does now ORDER, ADJUDGE AND DECREE that plaintiff class should be and hereby is awarded judgment against defendant City of Seattle, a municipal corporation, in the amount of $430,271.47 inclusive of principal and interest calculated in accordance with the stipulation of the parties entered February 28, 1990 1990, plus statutory attorney fees, and costs to be taxed.

DONE IN OPEN COURT this 28 day of February, 1990.

/s/ Marsha J. Pechman
JUDGE

Presented by:

/s/ Sandra M. Watson
SANDRA M. WATSON
Assistant City Attorney
Attorney for Defendants
WSBA No. 12874

Approved for Entry, Notice of Presentation Waived:

/s/ Richard B. Sanders
RICHARD B. SANDERS
Attorney for Plaintiff Class
WSBA No. 2813

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CLASS ACTION
NO. 88-2-09850-6

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, WILLIAM JUSTEN and JANE DOE JUSTEN, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband, HOLLY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person,

Defendants.

[Filed January 30, 1990]

PARTIAL SUMMARY JUDGMENT

The undersigned Judge of the above-entitled court heard plaintiffs' motion for partial summary judgment on this date. With respect thereto this court considered the following pleadings:

1. Discovery Declaration of Richard B. Sanders;
2. Plaintiffs' First Request for Admissions and Amended Answers Thereto,
3. Plaintiffs' Second Request for Admissions and Amended Answers Thereto;
4. Declaration of William Courtney;
5. This motion.

6. Affidavits of Watson, Hepfer, Kipp and attachments;

7. Cross motion of Seattle and memorandum

8. Reply of Plaintiffs

WHEREFORE this court does now

ORDER, ADJUDGE AND DECREE as follows:

1. This court determines as a matter of law that the 3 year statute of limitations applies to plaintiffs' claims from date of payment.

2. Plaintiff class is awarded partial summary judgment against defendant City of Seattle for those sums itemized in William Courtney's declaration and in column (e) of the exhibits attached to plaintiffs' first and second requests for admissions, provided (1) those sums are not specifically denied in defendants' amended answers to plaintiffs' first request for admissions and answers to plaintiffs' second request for admissions and (2) the dates of payment thereof, as reflected in column (c) of the attached exhibits, are not barred by the statute of limitations.

3. Plaintiffs are further granted partial summary judgment against defendants for statutory interest on those sums referenced above from respective dates of payment at 12% per annum.

4. Plaintiffs are denied their reasonable attorney fees against defendant City of Seattle under 42 USC 1983 and RCW 64.40 and RCW 8.25.075 (at this time); provided that such award may be subsequent considered under RCW 8.25.075.

DONE IN OPEN COURT this 30 day of January, 1990.

Marsha J. Pechman
JUDGE

Presented By:

/s/ Richard B. Sanders
RICHARD B. SANDERS
Attorney for Plaintiff Class

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

NO. 88-2-09850-6

ROY W. and KATHLEEN ROBINSON, husband and wife, et al.,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, et al.,

Defendants.

[Filed May 1, 1989]

ORDER GRANTING PARTIAL SUMMARY JUDGMENT DISMISSING § 1983 LIABILITY

THIS MATTER came on for hearing on Defendant's Motion for Partial Summary Judgment to dismiss plaintiffs' claims of liability under 42 U.S.C. § 1983 against the defendants and plaintiffs' Motion for Partial Summary Judgment Establishing Section 1983 Liability.

The Court considered the pleadings listed below:

1. Complaint for Money Damages, Civil Rights Violation and Class Action;
2. Answer;
3. Order Certifying Class;
4. Defendants' Response to Cross-Motion for Partial Summary Judgment;
5. Affidavit of Michael P. Monroe in Support of Defendants' Cross-Motion;

6. Defendants' Memorandum of Authorities in Response to Cross-Motion;
7. Defendants' Rebuttal Memorandum;
8. Statement of Additional Authorities;
9. Plaintiffs' Motion for Partial Summary Judgment Establishing Seattle's § 1983 Liability;
10. Amicus Curiae Brief of Pacific Legal Foundation in Support of Respondent, R/L Associates, Inc.;
11. Various Orders Granting Motion for Summary Judgment Declaratory Judgment and Injuncture Relief and other relief in King county Cause Nos: 83-2-06176-8; 85-2-13092-8; 85-2-08121-8; 86-2-20459-8; 85-2-07764-4; 86-2-20459-8; and
12. Plaintiffs' Reply on Section 1983 Liability of City.

THIS COURT considered the oral argument of counsel and the pleadings and finds that there is no issue of material fact in dispute and that, as a matter of law, judgment should be entered in favor of the defendant dismissing the claims of liability premised upon 42 U.S.C. § 1983; Now, Therefore, it is

ORDERED that Defendant is hereby awarded Partial Summary Judgment against plaintiff class members; it is further

ORDERED that all claims of liability against defendant premised upon 42 U.S.C. § 1983 are hereby dismissed.

DONE IN OPEN COURT this 1 day of May , 1989.

/s/ Marsha J. Pechman
JUDGE MARSHA PECHMAN

Presented by:

DOUGLAS N. JEWETT
City Attorney

By /s/ Michael P. Monroe
MICHAEL P. MONROE

By _____
ROBERT C. WILLIAMS
Attorneys for Defendants

Copy Received

By /s/ Richard B. Sanders
RICHARD B. SANDERS

By _____
SALLY SAXON
Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CLASS ACTION

NO. 88-2-09850-6

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons and entities similarly situated,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, WILLIAM JUSTEN and JANE DOE JUSTEN, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband, MOLLY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person,

Defendants.

[Filed March 30, 1989]

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

THIS MATTER came on for hearing on Defendants' Motion for Partial Summary Judgment to dismiss plaintiffs' claims of personal liability against William and Jane Doe Justen, Beatrice and John Doe Ryan, Holly Miller and John Gayman, and their marital communities, and Ovid Thompson, a single person; and to dismiss the claim of punitive damages against said defendants and the defendant, The City of Seattle.

The Court considered the pleadings listed below:

1. Complaint for Money Damages, Civil Rights Violation and Class Action;
2. Answer;
3. Order Certifying Class;
4. Motion for Partial Summary Judgment;
5. Affidavit of William Justen;
6. Affidavit of Laura Gilbert;
7. Affidavit of Holly Miller;
8. Affidavit of Ovid Thompson;
9. Defendants' Memorandum of Authorities;
10. Declaration of Richard B. Sanders on Discovery Documents;
11. Motion to Strike Affidavits;
12. Plaintiffs' Memorandum of Authorities;
13. Supplement to Plaintiffs' Brief;
14. Plaintiffs' Response and Cross-Motion for Summary Judgment;
15. Motion to Strike Affidavit of James E. Fearn, Jr.;
16. Defendants' Rebuttal Memorandum;
17. Affidavit of Michael P. Monroe (dated March 13, 1989);
18. Affidavit of James E. Fearn, Jr.

THIS COURT considered the oral argument of counsel and the pleadings and finds that there is no issue of material fact in dispute and that as a matter of law judgment should be entered in favor of the Defendants dismissing the claims of personal liability against William and Jane Doe Justen, Beatrice and John Doe Ryan, Holly Miller and John Gayman, and Ovid Thompson because these defendants did not violate any clearly established federal rights of the members of the class through the enforcement of either of the Hous-

ing Preservation Ordinances (Nos. 109124 and 112342, as amended); and dismissing the claim of punitive damages against all of the aforementioned defendants and The City of Seattle; and the Court expressly finding that there is no just reason for delay, Now, Therefore, it is

ORDERED that Plaintiffs' Motion to Strike Affidavits and Motion to Strike the Affidavit of James E. Fearn, Jr. are hereby denied; it is further

ORDERED that Defendants are hereby awarded partial Summary Judgment against plaintiff class members; it is further

ORDERED that all claims of personal liability against defendants William and Jane Doe Justen, Beatrice and John Doe Ryan, Holly Miller and John Gayman, and their marital communities, and Ovid Thompson, a single person, are hereby Dismissed; it is further

ORDERED that William and Jane Doe Justen, Beatrice and John Doe Ryan, Holly Miller and John Gayman, and their marital communities, and Ovid Thompson, a single person, are hereby Dismissed from the claims of this lawsuit; and it is further

ORDERED that all claims of punitive damages against the aforementioned defendants and the defendant The City of Seattle, are hereby Dismissed; and it is further

ORDERED that this Judgment should be entered forthwith pursuant to CR 54(b).

DONE IN OPEN COURT this 30 day of March, 1989.

/s/ Marsha J. Pechman
JUDGE MARSHA PECHMAN

Presented by:

DOUGLAS N. JEWETT
City Attorney

By /s/ Michael P. Monroe
MICHAEL P. MONROE

By _____
ROBERT C. WILLIAMS
Attorneys for Defendants

Copy Received

By /s/ Richard B. Sanders
RICHARD B. SANDERS

By _____
SALLY SAXON
Attorneys for Plaintiffs

THE SUPREME COURT OF WASHINGTON

No. 57038-8

ROY W. ROBINSON, ET AL,

Appellants,

v.

THE CITY OF SEATTLE, ET AL,

Respondents.

[Filed June 17, 1992]

ORDER DENYING
MOTION FOR RECONSIDERATION

The Court having decided unanimously that the respondents' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 18th day of June, 1992.

/s/ Fred H. Dore
Chief Justice

THE SUPREME COURT OF WASHINGTON

No. 57038-8
King County No.
88-2-09850-6

ROY W. and KATHLEEN ROBINSON, husband and wife, individually and as partners d/b/a COMPUTER SLIDE COMPANY and that class of persons similarly situated,
Appellants,

vs.

THE CITY OF SEATTLE, a municipal corporation,
Respondent,

WILLIAM JUSTEN and JANE DOE JUSTEN, husband and wife, BEATRICE RYAN and JOHN DOE RYAN, wife and husband, MOLLY MILLER and JOHN GAYMAN, wife and husband, OVID THOMPSON, a single person,
Defendants.

MANDATE

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 14, 1992, became the decision terminating review of this court in the above entitled cause on June 17, 1992. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $2,584.00 awarded to Appellants and against Respondents. Order Denying Motion for Reconsideration was entered herein June 17, 1992. Copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 18th day of June, 1992.

/s/ C. J. Merritt
C.J. MERRITT
Clerk of the Supreme Court, State of Washington

cc: Mr. Richard Sanders
Hon. Mark Sidran
Ms. Sandra Watson, Asst.
Mr. Ronald Zumburn
Mr. Edward Connor
Mr. John Groen
Mr. Benajmin Gantt
Hon. Richard Andrews
Bellevue City Attorney
Mr. Richard Gidley
Reporter of Decisions

SUPREME COURT OF WASHINGTON

No. 57029-9

SINTRA, INC., ET AL,

Appellants,

v.

THE CITY OF SEATTLE, ET AL,

Respondents.

EN BANC

MAY 14, 1992

DURHAM, J. — In this land use action, we are asked to decide for the first time the impact of federal civil rights actions on our takings jurisprudence. Increasingly, this court is called upon to resolve disputes concerning land use regulation, and the trend is likely to continue. A body of cogent, workable rules upon which regulators and landowners alike can rely is essential to the task.

In 1989, this court affirmed a holding of contempt against the City of Seattle for enforcement of the Housing Preservation Ordinance (HPO) after it had been ruled invalid by the Superior Court. *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 411, 780 P.2d 838 (1989). Once again, we are asked to review the actions of the City in a similar situation. Plaintiffs, Sintra, Inc., and its shareholders, Keith and Patty Hamack and Arthur and Susan Stanley (Sintra), appeal an order dismissing on summary judgment all of their claims against Seattle and four of its employees. Sintra claims that the City violated Sintra's federal rights to substantive due process and just compensation for a taking of its property, and that it is entitled to damages under 42 U.S.C. § 1983. We reverse the summary judgment in favor of the City and remand for further proceedings.

In September 1984, Sintra purchased the Larned Hotel on Westlake Avenue near downtown Seattle. The building was in an advanced state of disrepair and was almost vacant. The previous owners were unable to find new tenants for the building, despite their repeated attempts.

Sintra intended to renovate the building, and put retail shops on the ground floor and a bed and breakfast on the upper two floors. The building was purchased for $670,000 — $120,000 down and an installment note payable over 3 years. The terms of the financing were not favorable, but Sintra was unable to obtain alternative financing. After relocating the few remaining tenants, Sintra learned that an adult entertainment business might be moving into the adjacent building, and it became apprehensive about the possibilities for developing a bed and breakfast.

When the adult entertainment establishment opened its doors in July 1985, Sintra tried to sell the building. Sintra hired real estate broker Wade Cole, but his attempts were unsuccessful. Sintra and Cole also searched diligently for someone to develop low income housing at the building. In the meantime, Sintra defaulted on its installment note, and ceased making payments.

Eventually, Sintra concluded that the only profitable use to be made of the building was to convert it to a ministorage warehouse. On October 29, 1985, Sintra applied to the City for a master use permit for that purpose. Sintra was informed that a housing demolition fee of $219,840 would be required under the HPO for the change of use.[1] Seattle Municipal Code (SMC) 22.210.

Sintra applied for a variance from the HPO fee on November 6, 1985. On November 12, 1985, the sellers accelerated the note. The parties dispute the ensuing course of events. The City claims that Sintra failed to provide requested information until August 1986. Sintra, however, claims that despite repeated requests, the City failed to make any recommendation concerning relief until September 1986. The record supports Sintra's allegations of a continuing course of requests to the City to hasten the process. Many letters were directed to the Department of Community Development (DCD). At every turn, Sintra informed the City of its financial hardship and its desire to resolve the situation. Moreover, a memo from a city employee to David Moseley of DCD written in January 1986 indicates that a ministorage warehouse would be acceptable. Nevertheless, no recommendation was given. In a meeting with Sintra and its lawyers in March 1986, when Moseley was questioned about his reasons for delaying action, he responded: "What are you going to do, sue us?"

Although the City continually acknowledged that the Larned was entirely unsuitable for housing, it insisted that the HPO fee must be paid. In addition, the City required Sintra to show that any endeavor would be profitable if the HPO were not in effect.

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[1]The HPO contained provisions requiring developers to either replace any low income housing they destroyed, or to pay a fee, based on the number of units, into a housing replacement fund. Seattle Municipal Code (SMC) 22.210.050, former SMC 22.210.120(A)(4). It also contained provisions requiring owners to pay tenant relocation fees, as well as providing notice and protection against anticipatory eviction. SMC 22.210.080-.100. Only the housing replacement provisions are at issue here.

In the meantime, events occurring on a different front became relevant. In July 1986, King County Superior Court found that the provisions of the HPO were an invalid tax unauthorized by statute. A permanent injunction was issued prohibiting the City from enforcing the HPO against another developer, San Telmo Associates. Although the decision was appealed, the City did not seek a stay of the injunction.

Finally, in September 1986, Moseley recommended that Sintra be granted conditional relief. Instead of simply waiving the HPO requirements, the conditional relief proposed by DCD would allow a variance for a ministorage warehouse, but would require full payment of the $219,840 fee if the use of the property were later changed. Sintra appealed, seeking a complete waiver of the fee. Defendant Holly Miller, Director of the City's Department of Construction and Land Use, adopted the recommendation given by Moseley in October 1986. Among the reasons given in a concurrent memo, a city employee noted that granting complete administrative relief would "establish an undesirable precedent". The memo also recognized that the City's law department recommended granting the variance and full relief from the fee.

Sintra appealed further to a hearing examiner, who reversed Miller's action and remanded. The examiner concluded that the conditional relief was not allowed under the SMC, but that Sintra should still be granted some form of partial relief so that it could use its property. Sintra did not appeal from this decision, which apparently was never carried out.

In April 1987, this court affirmed the trial court's order invalidating the housing replacement provisions of the HPO. *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 25, 735 P.2d 673 (1987). We held that those requirements amounted to an unauthorized tax, as opposed to a regulation on development. *San Telmo*, at 24. We reasoned that shifting the social cost of development from the public at large to individual developers was a tax to "accomplish desired

public benefits which cost money . . .' ". *San Telmo*, at 24 (quoting *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982)). Such a tax can only be levied when authorized by the Legislature; it is not a valid exercise of a city's police power. Moreover, under RCW 82.02.020, cities are expressly prohibited from taxing development. We also noted, in dicta, that the high fees involved could constitute a taking under the Washington Constitution. *San Telmo*, at 25.

On June 22, 1987, the City finally issued a change of use license and a master use permit to Sintra. But by then, Sintra claims, it was too late. The market opportunity was gone, and the building was in an advanced state of disrepair.

This court again considered the HPO in 1989, and struck down the tenant relocation provisions. *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 409, 780 P.2d 838 (1989). There, we held that RCW 82.02.020 also prohibited the imposition of the costs associated with tenant relocation, since those requirements constituted an indirect charge on development. *R/L Assocs.*, at 409. We declined to reach the issue of whether a taking had occurred, *R/L Assocs.*, at 410, and also refused to consider the substantive due process claim because plaintiff had failed to plead it properly and had not argued it to the trial court. *R/L Assocs.*, at 412.

In addition, this court found that the City's continued enforcement of the tenant assistance provisions after they had been ruled invalid by the Superior Court was contempt of court. *R/L Assocs.*, at 411. In response to the City's claim that the injunction applied only to R/L, we noted:

> [T]he City's argument would lead to the absurd conclusion that it is free to enforce the provisions of a facially invalid ordinance against the citizens of Seattle until and unless each aggrieved party brings its own action challenging the ordinance. . . .
>
> . . . .
>
> The City's decision to continue to enforce the HPO was deliberate. Two days after issuance of the injunction in this case, the City issued a news release that the city attorney had advised the Department of Construction and Land Use to

> continue to enforce the tenant relocation requirements. The release stated that the City had been enjoined from enforcing this provision in one case. The courts need not tolerate this intentional violation of a valid judgment that prohibited the City from enforcing those provisions.

R/L Assocs., at 411.

Sintra filed this action in October 1988. It claimed damages under 42 U.S.C. § 1983 for deprivation of its substantive due process rights and an unconstitutional taking. In addition, Sintra raised claims of inverse condemnation and wrongful interference with a business expectancy. It also requested attorney fees pursuant to 42 U.S.C. § 1988. In October 1989, in a separate action, the trial court rescinded the sale of the Larned as the remedy for misrepresentation. In the case at bar, cross motions for summary judgment were heard on February 2, 1990, and the trial court granted summary judgment to the City. Sintra appealed directly to this court.

INTRODUCTION

This case primarily involves an action against the City of Seattle (City) and several officials under 42 U.S.C. § 1983. Essentially, § 1983 provides remedies not otherwise available in tort as a matter of federal statutory law. Sintra asserts two underlying causes of action: First, that its rights under the Fifth Amendment and Const. art. 1, § 16 (amend. 9) were violated; that is, it claims that its property was taken for public use without just compensation. Second, Sintra claims that it was denied substantive due process by the enforcement of the HPO.

The ordinance, as explained above, has been declared invalid on previous occasions, and that issue is not before the court here. However, because our prior cases were based on statutory grounds, the constitutional questions raised by Sintra have not been addressed. Sintra now seeks reversal of the summary judgment entered in favor of all defendants

so that it may proceed to trial on money damages for the losses it suffered from the prior enforcement of the HPO.[2]

42 U.S.C. § 1983

[1-3] We begin with a review of the civil rights statute. Under 42 U.S.C. § 1983, a plaintiff may recover money damages if it can show that it has been deprived of some federal right. State courts have concurrent jurisdiction to hear and decide § 1983 claims. Kenneth B. Bley, *Use of the Civil Rights Acts To Recover Money Damages for the Over-regulation of Land*, 14 Urb. Law. 223, 229 (1982). 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are only two essential elements in a § 1983 action: (1) the plaintiff must show that some person deprived it of a federal constitutional or statutory right; and (2) that person must have been acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981); *American Legion Post 32 v. Walla Walla*, 116 Wn.2d 1, 12, 802 P.2d 784 (1991); *Jordan v. Oakville*, 106 Wn.2d 122, 134, 720 P.2d 824 (1986). A local government is a "person" for purposes of § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978); *Turngren v. King Cy.*, 104 Wn.2d 293, 311, 705 P.2d 258 (1985). Land use disputes, including takings claims, are an appropriate subject of § 1983 actions. *Front Royal &*

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[2]In considering an appeal from an order of summary judgment, this court engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The court considers all facts submitted and all reasonable inferences from the facts in a light most favorable to the nonmoving party, here, Sintra. *Marincovich*, at 274. The motion should be granted only when there is no genuine issue of material fact, and, as a matter of law, the moving party is entitled to judgment. *Wilson v. Steinbach*, 98 Wn 2d 434, 437, 656 P.2d 1030 (1982).

Warren Cy. Indus. Park Corp. v. Front Royal, Va., 708 F. Supp. 1477, 1483 (W.D. Va. 1989).

To state a cause of action, then, a plaintiff need only allege that (1) defendant acted under color of state law, and (2) defendant's conduct deprived plaintiff of rights protected by the Constitution or laws of the United States. *Brower v. Wells*, 103 Wn.2d 96, 105, 690 P.2d 1144 (1984). The language contained in Sintra's complaint is more than sufficient to state a cause of action.[3]

FEDERAL RIGHTS

[4] We have previously held that land use regulations which too drastically curtail property owners' use of their property either may cause a constitutional taking or may constitute a denial of substantive due process. *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 329, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987) (*Orion* II), *cert. denied*, 486 U.S. 1022 (1988). *Presbytery* set forth the appropriate analysis for claims of overly severe land use regulation and delineated the tests to be used under the alternative analyses.

[5] Under *Presbytery*, a court inquires, as a threshold matter, whether the challenged regulation safeguards the public interest in health, safety, the environment, or fiscal integrity. *Presbytery*, at 329. The court also asks if the regulation destroys one or more of the fundamental attributes of property ownership — the right to possess, to exclude others, and to dispose of property. *Presbytery*, at 329-30 citing Richard L. Settle, *Regulatory Taking Doctrine in*

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[3] The complaint alleges that: "The defendants herein have violated the Civil Rights of the plaintiffs by acting under color of law to enforce the HPO against plaintiffs in contravention of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983. Defendants have maliciously, recklessly and/or wantonly violated the constitutional rights of the plaintiffs by willfully enforcing an ordinance unconstitutional on its face even after the ordinance had been judicially declared invalid and/or continued enforcement had been permanently enjoined by judicial decree. Defendants have taken property from plaintiffs without Due Process nor have they paid Just Compensation." Clerk's Papers, at 7.

Washington: Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339, 356 (1988-1989)). If no fundamental attribute of property is implicated, and the regulation protects the public from a permissible harm, then a constitutional taking does not exist, but a substantive due process claim may still be available.

1. Takings Clause.

[6] Sintra claims that the HPO prevented economically viable use of its land, and that its property was thus taken without just compensation. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The restriction is applied to the states through the Fourteenth Amendment. *See Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897). The Washington Constitution provides the same right.[4] In addition to outright physical appropriation of property, a taking can be accomplished by overregulation. A taking by regulation is often called an inverse condemnation, because the condemnation is found by the court *after* it has already been implemented by the regulation. Compensation is nonetheless required under the constitution if the property was taken for public use.

In *Presbytery of Seattle v. King Cy.*, *supra*, this court clarified regulatory takings analysis and made plain the

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[4]Const. art. 1, § 16 (amend. 9) reads as follows:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use."

necessary steps to show that a taking had occurred. We employ the *Presbytery* framework here, and also refer to the rules set out by the United States Supreme Court in its 1987 trilogy of land use regulation cases: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). This is for two reasons. First, the United States Constitution sets a minimum standard that prescribes that compensation must be given if a taking has occurred. Second, the issue before the court here concerns the deprivation of a federal right. State law may provide useful guidance in this determination, but federal law is ultimately controlling.[5]

[7] In *Presbytery*, this court identified a threshold inquiry, to be decided prior to application of a takings analysis. If the challenged regulation is merely an exercise of the police power to safeguard the public interest in health, safety, the environment, or fiscal integrity, it is not a taking. *Presbytery*, at 329. The regulation may be a taking, however, if it "goes beyond preventing a public *harm* [to] actually enhance [] a publicly owned right in property."[6] The City relies heavily on its argument that Sintra has not met this threshold. It claims that the HPO was "enacted to prevent a public harm — displacement and homelessness of low-income tenants. By no stretch of the imagination did it enhance a publicly-owned interest in property." Brief of Respondent, at 37.

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[5] *See also* Comment, *Taking Issue With Takings: Has the Washington State Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991).

[6] A regulation may also be a taking if it destroys one or more of the fundamental attributes of property ownership — the rights to possess, to dispose, or to exclude others. *Presbytery*, at 329-30; *Nollan*, 483 U.S. at 831. If an attribute of property is implicated, then it is likely that a taking has occurred. *Presbytery*, at 333 n.21 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980)).

A closer examination of the policies behind this threshold inquiry is necessary to resolve this question. The threshold test is designed to prevent undue chilling on legislative bodies' attempts to properly and carefully structure land use regulations which prevent public harms. *Orion* II, at 649. It is permissible for legislative bodies to wield police power to prevent activities which are similar to public nuisances. In *Keystone*, the Supreme Court discussed the difference between preventing harm and providing a benefit as follows:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.
>
> . . . "[A] taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and we recognized that this question "necessarily requires a weighing of private and public interests."

(Footnotes and citations omitted.) *Keystone*, at 491-92. Thus, land use regulation in the nature of restricting nuisance-like activity is permissible. But regulations which enhance public interests, and go beyond preventing harmful activity, may constitute a taking.

[8] The regulatory scheme here goes beyond preventing harm. The HPO required that landowners who wished to alter the use of their property either replace the low-income housing or pay extremely high sums of money into a housing replacement fund. The harm sought to be prevented — people standing on the street corner with nowhere to go — was exceeded. The regulation required the improper additional step of providing new housing. Moreover, this burden was unfairly allocated to individual property owners, rather

than equally distributed among all citizens. This "goes beyond preventing a public harm". *Presbytery*, at 333.

[9] In our previous decisions involving the HPO, we have said as much. In characterizing the HPO as an invalid tax, this court said:

> Requiring a developer either to construct low income housing or "contribute" to a fund for such housing gives the developer the option of paying a tax in kind or in money. . . . The City is . . . shifting the public responsibility of providing such housing to a limited segment of the population. This shifting is a tax, and pursuant to RCW 82.02.020, it cannot be allowed.

San Telmo, 108 Wn.2d at 24. Certainly, a regulatory scheme which is later determined to be a tax surpasses the proper scope of the City's police power.[7] We, therefore, can determine, as a matter of law, that the HPO was not a proper exercise of the City's police power, and *Presbytery*'s threshold requirements have been met here.

[10] Our inquiry does not end with this determination, however. A regulation effects a taking of private property if "it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.' " *Keystone*, 480 U.S. at 485 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980)); *Nollan*, 483 U.S. at 834. In *Presbytery*, the court expounded on the precise application of this test.

First, if the regulation does not "substantially advance[] legitimate state interests", then it automatically constitutes a taking. *Presbytery*, at 333; *see Nollan*, at 834-35. Here, the regulation must fairly be said to substantially advance a

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[7] Sintra relies on an alternative method of passing the threshold. If the public is actually provided with some use of the owner's land, such as an easement across it, a taking has almost certainly occurred. *Nollan*, at 831. This type of situation may properly be called an "exaction", as opposed to a "use", case. An analysis of an exaction case focuses on the *nexus* test set forth in *Nollan*. *Nollan*, at 841. Any conditions on development must serve the same purpose as the ban on development, or the regulation requiring those conditions will be a taking requiring compensation. *Nollan*, at 836-37. This type of inquiry is useful in determining if regulations which place conditions on development will be allowed. This is not an exaction case, however, because no physical invasion has been effected by the HPO. Thus, contrary to Sintra's arguments, the *Nollan* nexus test does not apply.

legitimate interest of the City in protecting its low income housing supply. If the regulation were valid, of course, the money raised could help to alleviate any housing shortage.

[11] The question of economic viability of this particular property is more troublesome.[8] To determine if the regulation's economic impact is excessive, and thus constitutes a taking, we have suggested three factors to consider. The court should consider: "(1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action." (Footnotes omitted.) *Presbytery*, at 335-36; *see also MacLeod v. County of Santa Clara*, 749 F.2d 541, 545-49 (9th Cir. 1984).

Our review of the record indicates that there are insufficient facts to evaluate either the first or second factor of the *Presbytery* analysis.[9] The extent of the economic impact of the HPO on Sintra's property is unclear. The City contends that any economic problems were of Sintra's own making, brought about by poor business decisions. Certainly, the extent that the regulation has interfered with the expectations of Sintra, as well as the question of whether those expectations were investment backed, has not been resolved, and is indeed hotly disputed. Again, the City claims that Sintra could not have found investors in its plan to turn the Larned into a ministorage warehouse, and never really expected to have a profitable business at that location. Sintra, however, argues that at least it would not have lost its investment entirely had it been allowed to proceed,

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[8] A facial challenge is treated differently than one involving application of the regulation to specific property. *Presbytery*, at 333; *Keystone*, at 495. "[I]f the challenge to the regulation is a facial one, and if the landowner succeeds in showing that a regulation denies all economically viable use of any parcel of regulated property, then a constitutional taking has occurred." *Presbytery*, at 335; *cf. Robinson v. Seattle*, 119 Wn.2d 34, ___ P.2d ___ (1992). This is a stricter standard than that used for as-applied challenges. Since a specific property is involved, this is an as-applied challenge to the HPO.

[9] Determining if a taking has occurred is a question of fact. *Front Royal*, 708 F. Supp. at 1484.

and claims to be able to produce expert opinions in support of its position.

The third consideration — character of the government action — has been resolved by our earlier cases. That action has previously been determined to be in the nature of a tax. *San Telmo Assocs. v. Seattle, supra*. A city may, in the proper exercise of its police powers, impose limitations on development through regulation. *See Presbytery*, at 336 n.30. However, the HPO amounted to a cost-shifting device "under the guise of a regulation." *San Telmo*, 108 Wn.2d at 24. Thus, as above, the provisions of the HPO exceed the regulatory authority of the City. Without such authority, the government action here was essentially an appropriation. The third factor, then, indicates that a taking has occurred.

In sum, Sintra has shown that there are issues of material fact which must be resolved at trial. Thus, the order of the trial court granting summary judgment must be reversed. If Sintra is able to show at trial that the economic burden placed on its property was so great that no viable use was available, then compensation for that taking is available. *Presbytery*, at 336.

[12] Even a temporary taking is compensable under the Fifth Amendment, and Sintra need not prove that the property remained unusable after the HPO was invalidated. *First Lutheran*, 482 U.S. at 319; *Wheeler v. Pleasant Grove*, 833 F.2d 267, 270-71 (11th Cir. 1987). Because any taking occurred prior to Sintra obtaining a favorable rescission judgment against the original owners of its property, the City's argument that the result of Sintra's lawsuit against the sellers impacts our holding is incorrect. The City may therefore be liable to Sintra for a temporary taking. Damages would be measured from the time of the interference to the time the HPO was no longer enforced. *First Lutheran*, at 320-21.

[13] In addition, exhaustion of administrative remedies is necessary before a court can properly determine a takings claim. *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 80, 768 P.2d 462 (1989). If the government entity responsible

for administering the regulation in question has not yet reached a final decision, the claim may be premature as a matter of federal law. *Williamson Cy. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). The Supreme Court has emphasized "an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986). This requirement was imposed in *Presbytery* as well, and the rule was established that a landowner must exhaust administrative procedures in an attempt to secure permission to use the property. *Presbytery*, at 339.

On the record before the court, it appears that Sintra was diligent in pursuing administrative avenues. Sintra applied for necessary permits, and requested a variance from the HPO. It appealed adverse decisions, and communicated regularly with city officials. Although the City claims that Sintra was offered the opportunity to develop and rejected it, administrative remedies were at least attempted, and Sintra was informed that a $219,000 fee would be required. Moreover, the City did not raise exhaustion as a defense at the trial court. It may well be that additional efforts would have been futile, in light of the particular facts and circumstances of this case. *See Estate of Friedman*, at 80-81. However, because the trial court has not yet had the opportunity to resolve these questions, we remand the issue.[10]

[14] In order for liability to arise under 42 U.S.C. § 1983, Sintra must also show that the takings claim is ripe for review. Under federal law, if a landowner fails to seek compensation through *state* judicial procedures, a takings claim is said to be not yet ripe. *Williamson*, at 194; *see also* Richard L. Settle, *Regulatory Taking Doctrine in Washing-*

[10]The exhaustion issue is a question of law for the trial court to decide, although it does involve resolution of factual matters. *Estate of Friedman*, at 76. Additionally, even though this issue was not fully developed originally, it may be considered by the trial court on remand. *Cf. Bennett v. Hardy*, 113 Wn.2d 912, 918-19, 784 P.2d 1258 (1990).

ton: Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339, 357 (1988-1989). That is, as a matter of federal law, just compensation has not been denied, and so no federal right is involved, until the state has denied a plaintiff's cause of action in inverse condemnation. *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988); *Abbiss v. Delaware Dep't of Transp.*, 712 F. Supp. 1159, 1162 (D. Del. 1989).

The federal rule was set forth in *Williamson*:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

(Citations omitted.) *Williamson*, 473 U.S. at 194-95. Here, the proper procedures and standards for a takings claim under state law are those set forth in *Presbytery* and explained above. Because we have been guided by federal law in our formulation, the inquiry is essentially the same. Nevertheless, the § 1983 claim here (a federal law claim) is unavailable to Sintra because it has not obtained a decision under state inverse condemnation law.

In sum, we hold that the regulation passes the threshold test of *Presbytery*, and should be subjected to a takings analysis under state law. We therefore remand for further proceedings, to examine whether the exhaustion requirement has been satisfied; and if so, to determine if a taking has in fact occurred, the time period of any taking, and appropriate damages.

2. Substantive Due Process.

[15] Sintra claims that the continued enforcement of the HPO after it had been declared invalid arbitrarily deprived it of its property, and thus violated its right to due process. The Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law". This clause is a limit on a state's ability to pass unreasonable or irrational laws which deprive

individuals of property rights. The inquiry here is distinct from the takings analysis, and a separate standard is used. *Nollan*, at 834 n.3. A substantive due process claim need not show that *no* viable use of the property remains, *Herrington v. County of Sonoma*, 834 F.2d 1488, 1498, 857 F.2d 567 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989), but rather that any interference with property rights was irrational or arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976). There is no question that Sintra has a property right which is implicated here. Instead, the issue centers around whether the HPO was a permissible regulation of that property.[11]

[16] To determine if a regulation results in a denial of due process, the court engages in a balancing test. We ask: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Presbytery*, 114 Wn.2d at 330; *Orion* II, 109 Wn.2d at 646-47; *Lawton v. Steele*, 152 U.S. 133, 38 L. Ed. 385, 14 S. Ct. 499 (1894).

The first part of the test is not seriously disputed. The HPO was designed to preserve low income housing units. It attempted to achieve that purpose by offering property owners the option of replacing lost units themselves or contributing financially to a housing replacement fund. This is a legitimate goal. The second part — reasonable means — is highly suspect given the manner in which the City conducted itself. However, we need not decide if the regulation violates substantive due process on that basis alone.

[17] The oppressive nature of the regulation is itself violative of due process. In *Presbytery*, the court listed

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[11]Exhaustion of administrative remedies is generally not required under § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). The particular exhaustion rules applied to the takings claim discussed above do not extend to the substantive due process claim. Moreover, unlike an action for just compensation under the takings clause, an action for a violation of substantive due process is ripe immediately (without regard to state remedies) because the harm occurs at the time of the violation. *See Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

several nonexclusive factors which should be considered in determining if a regulation is unduly oppressive, such as the nature of the harm, the availability and effectiveness of less drastic measures, and the economic loss suffered by the property owner. *Presbytery*, at 331. Additional factors involve consideration of both the public's interests and those of the regulated landowner, and include:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, at 331 (citing Stoebuck, San Diego Gas: *Problems, Pitfalls and a Better Way*, 25 Wash. U.J. Urb. & Contemp. L. 3, 33 (1983)).

In a strictly economic case, such as this one, certain of these factors are more relevant than others. In particular, Sintra's property cannot be singled out as contributing to the problem of homelessness in any pronounced way; the lack of low income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property. Moreover, the harm here can be solved by fiscal measures that would be less drastic in regard to a particular landowner. Additionally, the entire burden of the regulation falls on landowners who wish to develop their land. The economic impact on Sintra is enormous. It was asked to pay a $218,000 fee to develop a $670,000 piece of property. As we have previously noted in regard to the HPO, this is "shifting the public responsibility of providing such housing to a limited segment of the population." *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 24, 735 P.2d 673 (1987). A regulation with such an unbalanced impact violates due process.

[18] When money damages are sought, however, as opposed to a judgment invalidating the ordinance, an additional requirement has been imposed. In discussing the availability of § 1983, we have said that "a land use decision 'denies substantive due process only if it is invidious or irrational.' " *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838 (1989) (quoting *Harding v. County of Door*, 870 F.2d 430, 431 (7th Cir. 1989)). Other courts have expressed the test differently, but conveyed essentially the same test. Relief is said to be available for § 1983 claims involving substantive due process only where there is a substantial infringement of state law prompted by animus directed at an individual or a group, or a "deliberate flouting of the law that trammels significant personal or property rights". *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988). Arbitrary, irrational action on the part of regulators is sufficient to sustain a substantive due process claim under § 1983. *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988); *Abbiss*, 712 F. Supp. at 1164.

The City claims that it acted rationally,[12] and relies on the rule that it cannot be liable for money damages for the mere enforcement of an unconstitutional or void ordinance. *R/L Assocs.*, at 412. In addition, the City argues that Sintra cannot show that it was singled out in any way. The City also claims that it was merely obeying city ordinances and acting on the advice of its attorney.

Sintra argues that the conduct complained of here was indeed irrational. Sintra first applied for a master use permit in October 1985, and was told in November 1985 that it would need a change of use license under the HPO, which it could obtain by payment of a $218,000 fee. In July 1986, the King County Superior Court entered a declaratory judgment holding that the HPO was invalid. Although the City did not seek a stay or order of supersedeas, it continued to

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[12]The City also argues that Sintra did not plead irrational or invidious conduct, but this is incorrect. Sintra's allegation that the City and its employees acted willfully, wantonly and/or recklessly is sufficient.

enforce the provisions of the HPO until this court affirmed that judgment in April 1987. Thus, at the time that conditional relief was offered to Sintra (September 1986), the HPO had already been found invalid.

In *San Telmo*, this court agreed that the HPO was invalid as an unauthorized tax. There was no statutory authority for such a tax and, in fact, such authority was precluded by a statute preventing any tax on the development of land. RCW 82.02.020; *San Telmo*, 108 Wn.2d at 23-24. The tenant assistance provisions of the HPO were also found to be invalid by this court. *R/L Assocs.*, at 409. In addition, we held that the City's continued enforcement of the tenant assistance provisions in the face of the superior court order was contempt of court. *R/L Assocs.*, at 411.

We hold that Sintra may proceed on its § 1983 claim against the City. The reasoning we applied in *R/L Associates* could be applied here as well. Sintra argues that the City acted irrationally and invidiously, and "deliberately flouted" the law, because it continued enforcement of an ordinance that it knew to be invalid. Intentional violations of court orders cannot be tolerated. Respect for the rule of law lies at the heart of due process, and disregard of that law by government can only be considered violative of that right. We are persuaded that Sintra's allegations merit further inquiry into the facts, and should not have been disposed of on summary judgment.

Thus, we reverse the trial court's award of summary judgment. We hold that, as a matter of law, the regulation violates the substantive due process test set forth in *Presbytery*. A determination of whether the City's conduct violated Sintra's due process rights under § 1983 is still required. Because this is a § 1983 action, money damages are available.[13] We remand the case for further proceedings in accordance with this opinion.

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[13] In *Presbytery*, this court held that the only remedy for a substantive due process violation in the land use context is the invalidation of the regulation. *Presbytery*, at 332. No § 1983 claims were considered by the court, however.

INDIVIDUAL DEFENDANTS

[19, 20] The City argues that, as a matter of law, its individual employees are entitled to immunity from Sintra's claims. Local government bodies are not immune from a § 1983 suit merely because the alleged violation involves a discretionary decision or a governmental function. *Turngren v. King Cy.*, 104 Wn.2d 293, 311, 705 P.2d 258 (1985). Absolute immunity is not available for administrative acts of local officials. *Creekside Assocs., Inc. v. Wood Dale*, 684 F. Supp. 201, 205-06 (N.D. Ill. 1988). However, qualified immunity has been found to exist. Government officials performing discretionary functions are shielded from all liability for civil damages if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Front Royal*, 708 F. Supp. at 1480. The issue of immunity is a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985).

The standard set forth in *Harlow* supplants the good faith standard previously applied. *Cf. Wood v. Strickland*, 420 U.S. 308, 322, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975); *Harper v. State*, 110 Wn.2d 873, 884, 759 P.2d 358 (1988), *rev'd on other grounds*, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990). Qualified immunity is not available unless the government official can show that his or her conduct was objectively legally reasonable. *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Thus, a subjective, good faith belief that the conduct complained of was not unconstitutional will not suffice to prove immunity; the defendant must show that his or her conduct was objectively reasonable.

[21] The determination of whether a particular right is "clearly established" is a complex one. Substantive due process claims have previously been found to be "well established" by the federal court. *Bateson v. Geisse*, 857 F.2d 1300, 1304-05 (9th Cir. 1988); *Creekside*, at 206. But it is

not clear that this pronouncement ends our inquiry. The Supreme Court has addressed this very problem:

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

(Citations omitted.) *Anderson*, 483 U.S. at 640.

[22] There are insufficient facts on the record before us to decide if any or all of the individual defendants are entitled to qualified immunity.[14] A reasonable person should have known that enforcing the HPO in contravention of a court order prohibiting enforcement would constitute a denial of someone's rights. As outlined above, various city employees informed their superiors, defendants here, that relief should be granted in this case. In addition, Sintra consistently asserted that its rights were being violated by the City's actions, thus putting the defendants on notice that it intended to pursue those rights. But it is not at all clear what precise knowledge was held by the particular individuals. The City rests on its assertion that the conduct was reasonable, because the City's law department had recommended continued enforcement of the HPO. This single fact is not a sufficient basis for the immunity sought here. Because we are unable to determine if immunity is warranted here, we must remand this issue to the trial court.

We acknowledge the difficulty of the task: on remand, the trial court must determine, as a matter of law, if the individual defendants acted in an objectively reasonable way, and are therefore entitled to the protection of qualified immunity. That determination should be made on summary

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[14]Our decision here applies only to the substantive due process action. Individuals are not amenable to suit in inverse condemnation, and the § 1983 action has been resolved as it applies to the taking claim.

judgment. *Harlow*, 457 U.S. at 818. In doing so, the court should be guided by the underlying principles expressed in *Harlow*:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

(Footnotes and citations omitted.) *Harlow*, 457 U.S. at 819.

If the trial court decides that the individual defendants are not entitled to immunity, then the determination of whether the conduct at issue here violated the substantive due process rights of Sintra must be decided at trial. That does not necessarily entail a verdict in Sintra's favor, however. Again, to obtain a favorable verdict, Sintra must show first, that the regulation was violative of due process, and second, that the conduct here was irrational or invidious.

We have already determined that the regulation violated Sintra's due process rights. The remaining inquiry, then, is similar to that presented in considering immunity: whether the individual defendants acted irrationally. It may be that the question can only be settled by a factfinder. The reasonableness of the defendants' conduct can only be determined based on a clear understanding of the particular facts known by the individuals at any given time.[15]

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[15]Unlike the current case, in *Robinson v. Seattle*, 119 Wn.2d 34, ___ P.2d ___ (1992), the knowledge held by individuals is clearly on the record. Here, however, the only direct evidence in the record is a memo to David Moseley dated October 15, 1986, from a city employee noting that the ordinance had been "overruled" by the court.

OTHER CLAIMS

[23] Sintra also raised a claim of wrongful interference with a business expectancy. Although the City asserts that the claim was not properly pleaded, the complaint and attached claim for damages provide a "short and plain statement of the claim". CR 8(a)(1). To make out a claim for wrongful interference, Sintra must prove:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

Pleas v. Seattle, 112 Wn.2d 794, 800, 804, 774 P.2d 1158 (1989).

Here, Sintra has made sufficient allegations to survive a motion for summary judgment. Sintra had taken steps to convert its property into a ministorage warehouse, and had pursued necessary administrative procedures. Moreover, as explained above, there are many areas of disputed fact: the existence of a valid expectancy, the extent of the economic interference, the causal relationship between the City's interference and damages to Sintra, and the extent of such damages. In any event, the means employed by the City to prevent development of Sintra's property — the enforcement of an invalid ordinance in the face of a court order — were improper. We reverse the trial court's award of summary judgment on the wrongful interference claim.[16]

Finally, Sintra contends that if it prevails, it is entitled to reasonable attorney fees under 42 U.S.C. § 1988 and RCW

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[16] In a related matter, Sintra claims that an affidavit submitted to the trial court 3 days after the summary judgment hearing should not have been considered. The affidavit explained the City's position regarding the tortious interference claim. It is within the discretion of the trial court to consider affidavits which are filed late. *Rainier Nat'l Bank v. Inland Mach. Co.*, 29 Wn. App. 725, 730, 631 P.2d 389 (1981).

8.25.075(3). The trial court granted fees to the City. Since we hold that Sintra should be allowed to proceed, the award of attorney fees to the City should be vacated. Any award of attorney fees should await resolution of the case. *See, e.g., State v. Buckley*, 18 Wn. App. 798, 801, 572 P.2d 730 (1977).

CONCLUSION

In sum, we hold the following:

1. The order of summary judgment in favor of the City is reversed, and Sintra may go forward on its claim of a taking without just compensation, or inverse condemnation. Moreover, we hold that the threshold requirements of *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 329, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990) have been met. However, because it is not yet ripe, the related claim under 42 U.S.C. § 1983 was properly dismissed. We remand for further proceedings consistent with our opinion.

2. The order of summary judgment in favor of the City is reversed on Sintra's claim against the City for a violation of substantive due process under 42 U.S.C. § 1983. We hold that the HPO violated substantive due process, and remand for a determination of whether the City's conduct was irrational or invidious.

3. The order of summary judgment dismissing Sintra's claims against individual defendants is reversed, and we remand for the trial court to consider whether qualified immunity attaches. Absent immunity, Sintra may proceed against the individual defendants for deprivation of its right to substantive due process under 42 U.S.C. § 1983.

4. We reverse the order for summary judgment in favor of defendants as it pertains to the wrongful interference claim.

5. We reverse the award of attorney's fees and costs to the City, and reserve any award of fees pending resolution of the remaining claims.

DORE, C.J., and BRACHTENBACH, DOLLIVER, ANDERSEN, SMITH, and GUY, JJ., concur.

remedies in such a suit. *Williamson*, 473 U.S. at 192 (citing *Patsy v. Board of Regents*, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982)). The Court, however, differentiated finality and exhaustion:

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, 473 U.S. at 193.[17] The Court found that there was not a final agency decision because the plaintiff had not sought variances from the Commission. It stated, however, that finality would not have required appeals, for example, to the Board of Zoning Appeals. *Williamson*, 473 U.S. at 193.

Thus, when a plaintiff brings a § 1983 takings action, we should employ the 2-part test used in *Williamson* to determine whether the action is ripe: (1) Has there been final agency action on the application of the regulation? and (2) Has the plaintiff utilized state procedures for obtaining compensation? The majority correctly concludes that Sintra has not utilized state procedures for obtaining compensation. On that basis alone, this case is not ripe for purposes of § 1983. Therefore, we need not reach the issue of whether there was final agency action to resolve the § 1983 ripeness issue.

---

[17] The Court's categorical distinction between exhaustion and finality in *Williamson* is, however, questionable. The Court in *Williamson* unduly restricted the exhaustion of administrative remedies doctrine by limiting its exhaustion of administrative appeals. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. Ill. L. Rev. 547, 613 n.294. A better approach is to recognize, as Professor Davis does, that finality is an aspect of both ripeness and exhaustion, and that issues of finality arise at the intersection of these two doctrines. 4 K. Davis, *Administrative Law Treatise* § 25.1, at 350, § 26.10, at 458 (2d ed. 1983).

III

The Inverse Condemnation Claim

There remains, however, Sintra's inverse condemnation claim. Unlike the § 1983 claim, it is appropriate for us to use the term "exhaustion of administrative remedies" in considering that claim. Moreover, we should not construe this term narrowly to mean only whether Sintra has pursued its administrative appeals, as the Court in *Williamson* did in the § 1983 context. Instead, the exhaustion inquiry should be "how far a party must pursue an administrative remedy before going to court". 4 K. Davis, *Administrative Law Treatise* § 25:1, at 350 (2d ed. 1983). The two reasons for the exhaustion doctrine we listed in *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 77-79, 768 P.2d 462 (1989) should be assessed in determining whether Sintra has exhausted its administrative remedies. First, we noted the policies favoring the doctrine of exhaustion. Those policies are to

> (1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise [in its area], (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore [its] procedures by resort[ing] to the courts.

Estate of Friedman, 112 Wn.2d at 78 (quoting *Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985) (citing *South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984))). The second reason, which is "at least as important" is that it is difficult to assess a takings claim when administrative remedies have not been exhausted. *Estate of Friedman*, 112 Wn.2d at 78. Issues central to the takings inquiry, such as the economic impact of the regulation, or its affect on investment backed expectations, may be impossible to assess if a plaintiff has not sought administrative relief and there is no final agency action. The trial court should consider the reasons we listed

in *Estate of Friedman* for the exhaustion doctrine when it considers the exhaustion issue.

JOHNSON, J., concurs with UTTER, J.

THE SUPREME COURT
STATE OF WASHINGTON

February 4, 1991

Mr. Richard B. Sanders
Attorney at Law
4122 128th Avenue SE, Suite 301
Bellevue, Washington 98006

Honorable Mark Sidran
Seattle City Attorney
Ms. Miriam M. Reed, Asst.
Mr. Robert C. Williams, Asst.
600 Fourth Avenue, 10th Floor
Seattle, Washington 98104

Re: Supreme Court No. 57029-9 - Sinatra, Inc., et al. v. The City of Seattle, et al.

King County No. 88-2-18865-3

Counsel:

On February 4, 1991, the Court reviewed the above referenced case and determined to retain the cause for decision. The case will be set at a later date.

Sincerely,

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Supreme Court Deputy Clerk

CSD: csd

cc: Hon. M. Janice Michels, Clerk
King County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

NO. 88-2-18865-3

SINTRA, INC., an Oregon corporation qualified and doing business in Washington, KEITH H. HAMACK and PATTY L. HAMACK, husband and wife and their marital community; ARTHUR M. STANLEY and SUSAN S. STANLEY, husband and wife, and their marital community,

Plaintiffs,

v.

THE CITY OF SEATTLE, a municipal corporation, HOLLEY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person, DAVID MOSELEY and JANE DOE MOSELEY, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband,

Defendants.

[Filed March 21, 1990]

NOTICE OF APPEAL TO WASHINGTON STATE SUPREME COURT

Sintra, Inc., Keith H. and Patty L. Hamack, Arthur M. Stanley and Susan S. Stanley, plaintiffs, herewith appeal to the Supreme Court of the State of Washington from this court's Order Denying Motion For Reconsideration entered February 28, 1990 and this court's Order Granting Defendants' Motion for Summary Judgment entered on February 28, 1990.

DATED: March 16, 1990.

/s/ Richard B. Sanders
RICHARD B. SANDERS
Attorney for Plaintiffs
WSBA No. 2813

Attorney for Defendants

Michael P. Monroe
Special Assistant City Attorney
3600 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7081
(206) 386-7032

Robert C. Williams
Assistant City Attorney
10th Floor, Municipal Bldg.
600 - 4th Avenuecipal Bldg.
Seattle, WA 98101
(206) 684-8200

SUPERIOR COURT OF WASHINGTON
FOR COUNTY OF KING

NO. 88-2-18865-3

SINTRA, INC., et al,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal corporation, BEATRICE RYAN and JOHN DOE RYAN, her husband, HOLLY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person, DAVID MOSELEY and JANE DOE MOSELEY, his wife,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court upon the defendants' Motion for Summary Judgment, the court having considered the argument of counsel and the following:

1. The Defendants' Motion for Summary Judgment Dismissing Plaintiffs' Claims;
2. Affidavit of Michael P. Monroe in Support of Defendants' Motion for Summary Judgment Dismissing Plaintiffs' Claims and Attachments Thereto;
3. Declaration of Keith Hamack;
4. Declaration of Wade Cole;
5. Declaration of Richard Sanders;
6. Plaintiffs' Cross Motion for Summary Judgment and Motion to Strike Affidavits;
7. Plaintiffs' Memorandum on Summary Judgment;

8. Defendant's Rebuttal Memorandum;
9. Supplemental Affidavit of Michael P. Monroe;
10. Complaint for Damages and Civil Rights Violation;
11. Answer;
12. Defendant's First Set of Interrogatories to Plaintiffs and Answers Thereto;

and the court being fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Cross Motion for Summary Judgment and Motion to Strike Affidavits are Denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Summary Judgment is Granted;

IT IS FURTHER ORDERED that plaintiffs' claims in this matter are dismissed; and

IT IS FURTHER ORDERED that plaintiffs shall pay defendants their statutory attorney's fees and costs in this matter.

DONE IN OPEN COURT this 28 day of February, 1990.

/s/ Charles S. Burdell, Jr.
JUDGE CHARLES S. BURDELL, JR.

Presented by:

MARK H. SIDRAN
CITY ATTORNEY

By /s/Michael P. Monroe
Michael P. Monroe
Special Assistant City Attorney
WSBA #8512
Of Attorneys For Defendants

THE SUPREME COURT OF WASHINGTON

No. 57029-9

SINTRA, INC., ET AL,

Appellants,

v.

THE CITY OF SEATTLE, ET AL,

Respondents.

[Filed June 17, 1992]

ORDER DENYING
MOTION FOR RECONSIDERATION

The Court having decided unanimously that the respondents' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 17th day of June, 1992.

/s/ Fred H. Dore
Chief Justice

THE SUPREME COURT OF WASHINGTON

No. 57029-9

King County No.
88-2-18865-3

SINTRA, INC., an Oregon corporation qualified and doing business in Washington, KEITH H. HAMACK and PATTY L. HAMACK, husband and wife and their marital community; ARTHUR M. STANLEY and SUSAN S. STANLEY, husband and wife, and their marital community,

Appellants,

v.

THE CITY OF SEATTLE, a municipal corporation, HOLLEY MILLER and JOHN GAYMAN, her husband, OVID THOMPSON, a single person, DAVID MOSELEY and JANE DOE MOSELEY, his wife, BEATRICE RYAN and JOHN DOE RYAN, her husband,

Respondents.

MANDATE

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 14, 1992, became the decision terminating review of this court in the above entitled cause on June 17, 1992. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $1,013.10 awarded to Appellants and against Respondents. Order Denying Motion for Reconsideration was entered herein on June 17, 1992. Copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 18th day of June, 1992.

/s/ C. J. Merritt
C.J. MERRITT
Clerk of the Supreme Court,
State of Washington

cc: Mr. Richard Sanders
Hon. Mark Sidran
Ms. Miriam Reed, Asst.
Mr. Robert Williams, Asst.
Ms. Sandra Watson, Asst.
Mr. Ronald Zumburn
Mr. Edward Connor
Mr. John Groen
Mr. Benjamin Gantt
Reporter of Decisions

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

No. 83-2-06176-8

SAN TELMO ASSOCIATES,
a Washington limited partnership,
Plaintiff,

v.

CITY OF SEATTLE, a municipal corporation,
Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

THIS MATTER was heard on October 12, 1983, before the Honorable Jerome Johnson, Judge of the above-entitled Court, on the motion of San Telmo Associates for summary judgment. Prior to making its decision, the Court reviewed the files and records herein, including but not limited to San Telmo Associates' motion for summary judgment granting declaratory and injunctive relief, affidavit of Howard H. Hagar, Jr., affidavit of G. Richard Hill, memorandum in support of motion for summary judgment granting declaratory and injunctive relief, reply memorandum in support of motion for summary judgment, and the City of Seattle's memorandum in opposition to motion for summary judgment, affidavit of Michael Hildt in opposition to summary judgment, affidavit of Charles Royer in opposition to summary judgment, and affidavit of Katy Chaney in opposition to summary judgment. The Court heard argument of counsel for San Telmo Associates and counsel for the City of Seattle. Based upon the materials reviewed, including the arguments of counsel, the Court makes the following findings:

1. The housing demolition license fee provisions of the City of Seattle Housing Preservation Ordinance, City of

Seattle Ordinance No. 109220, as amended, ("Housing Preservation Ordinance") impose a tax unauthorized by state law. The primary purpose of the housing demolition license fee provisions of the Housing Preservation Ordinance is to raise revenue for public benefits that cost money.

2. The housing demolition license fee provisions of the Housing Preservation Ordinance impose a tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commerical buildings, industrial buildings, or on any other building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land, within the meaning of the language of RCW 82.02.020. The housing demolition license fee provisions of the Housing Preservation Ordinance are in conflict with RCW 82.02.020 and therefore invalid and may not be enforced.

Based on the foregoing, it is hereby ordered:

1. The motion of San Telmo Associates for summary judgment is granted;

2. San Telmo Associates is hereby awarded a declaratory judgment that the housing demolition license fee provisions of the Housing Preservation Ordinance are an invalid tax unauthorized by the state and a tax, fee, or charge, prohibited by RCW 82.02.020. The housing demolition license fee provisions of the Housing Preservation Ordinance may not be enforced against San Telmo Associates or its heirs, successors, or assigns.

3. San Telmo Associates, its heirs, successors, and assigns are hereby granted a permanent injunction prohibiting the City of Seattle from enforcing the housing demolition license fee provisions of the Housing Preservation Ordinance against it, and this Court retains jurisdiction to enforce said injunction prohibiting the enforcement of the Housing Preservation Ordinance and also to consider San Telmo Associates' argument that any future successor to the Housing Preservation Ordinance is invalid under the law.

4. San Telmo Associates is hereby awarded its costs.

DONE IN OPEN COURT this 13th day of October, 1983.

/s/ Jerome M. Johnson, Judge
Jerome M. Johnson, Judge

Presented by:
FOSTER, PEPPER & RIVIERA

/s/ G. Richard Hill
G. Richard Hill, attorneys for
Plaintiff San Telmo Associates

Approved as to form and notice of presentation waived:

DOUGLAS N. JEWETT
City Attorney

/s/ James E. Fearn, Jr.,
James E. Fearn, Jr.,
Assistant
Attorneys for Defendant
City of Seattle

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NO. 85-2-13092-8

SAN TELMO ASSOCIATES, a Washington limited partnership, and TWELVE HUNDRED FIVE ASSOCIATES, a Washington limited partnership,

Plaintiffs,

v.

CITY OF SEATTLE, a municipal corporation,

Defendant.

[Filed July 15, 1986]

ORDER GRANTING SUMMARY JUDGMENT AND DECLARATORY AND INJUNCTIVE RELIEF

THIS MATTER CAME on for hearing before the undersigned judge of the above-entitled court on the motion of San Telmo Associates and Twelve Hundred Five Associates for summary judgment. Plaintiffs were represented by their attorneys, Foster, Pepper & Riviera and G. Richard Hill of that firm. Defendant was represented by its attorney, the City of Seattle Office of City Attorney.

Prior to making its decision, the court heard argument of counsel and considered the records and files herein including but not limited to all pleadings in this cause, the Affidavit of G. Richard Hill, the Affidavit of Howard H. Hagar, Jr. in support of Motion for Summary Judgment, Plaintiffs' Memorandum and Reply Memorandum in Support of Motion for Summary Judgment Granting Declaratory and Injunctive Relief and Defendant's Memorandum in Opposition to Motion for Summary Judgment.

Based upon the materials reviewed, including the arguments of counsel, the court makes the following findings:

1. The license fee and replacement provisions of the City of Seattle Housing Preservation Ordinance, codified at SMC 22.210 ("New Housing Preservation Ordinance") impose a tax unauthorized by state law. The primary purpose of the license fee and housing replacement provisions of the New Housing Preservation Ordinance is to raise revenue for public benefits that cost money.

2. The license fee and housing replacement provisions of the New Housing Preservation Ordinance impose a tax, fee or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or any other building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land, within the meaning of the language of RCW 82.02.020. The license fee and replacement provisions of the New Housing Preservation Ordinance are in conflict with RCW 82.02.020 and therefore invalid and may not be enforced.

Based on the foregoing, it is hereby ordered:

1. The motion of San Telmo Associates and Twelve Hundred Five Associates for summary judgment is granted;

2. Plaintiffs are hereby awarded a declaratory judgment that the license fee and housing replacement provisions of the New Housing Preservation Ordinance are an invalid tax unauthorized by the state and a tax, fee, or charge, prohibited by RCW 82.02.020. The license fee and housing replacement provisions of the New Housing Presrvation Ordinance may not be enforced against San Telmo Associates or Twelve Hundred Five Associates or their heirs, successors, or assigns.

3. San Telmo Associates and Twelve Hundred Five Associates, their heirs, successors, and assigns, are hereby granted a permanent injunction prohibiting the City of Seattle from enforcing the license fee and replacement

provisions of the New Housing Preservation Ordinance against them, and this court retains jurisdiction to enforce said injunction prohibiting the enforcement of the Housing Preservation Ordinance.

4. San Telmo Associates and Twelve Hundred Five Associates are hereby awarded their costs.

DONE IN OPEN COURT this 15th day of July, 1986.

/s/ Peter K. Steere
Judge

Presented By:

FOSTER, PEPPER & RIVIERA

/s/ G. Richard Hill
G. Richard Hill
Michael K. Vaska
Attorneys for Plaintiffs San Telmo Associates and Twelve Hundred Five Associates

Approved as to form; notice of presentation waived:

Douglas N. Jewett
City Attorney, City of Seattle

/s/ James E. Fearn
James E. Fearn
Assistant City Attorney,
Attorneys for Defendant City of Seattle

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 86-2-20459-8

R/L ASSOCIATES, INC.

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant,

THE CITY OF SEATTLE, a municipal corporation,

Third Party Plaintiff,

vs.

ROBERT HAZELBROOK, JANE DOE HAZELBROOK, and their marital community,

Third Party Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND DECLARATORY AND INJUNCTIVE RELIEF

This matter came on for hearing before the undersigned Judge of the above-entitled court on the motion of plaintiffs herein. Plaintiffs were represented by their attorney, Richard B. Sanders. Defendant was represented by its attorney, The City of Seattle, Office of City Attorney.

Prior to making its decision, the court heard argument of counsel and considered the records and files herein including:

1. Affidavit of Robert Hale
2. Amended Complaint for Damages and Equitable Relief (with attached Ordinance)
3. Plaintiffs' Motion for Partial Summary Judgment
4. City's Memorandum Opposing Plaintiffs' Motion

5. Affidavits of Caldwell, Hooper, Kennedy, Thompson

6.

7.

Based upon the materials reviewed, including the argument of counsel, this court makes the following findings:

1. The tenant relocation assistance provisions of Seattle Ordinance 112342, Sections 8, 9, and 10, codified at SMC 22.210 impose a tax unauthorized by state law and in violation of RCW 82.02.020. The primary purpose of the tenant relocation assistance provisions of the ordinance is to raise revenue, not regulate development.

2. Enforcement of the tenant relocation provisions of the ordinance constitutes a taking of property without just compensation and without due process of law in contravention of the Fifth and Fourteenth Amendment to the United States Constitution as well as Article I, Section 3 and 16 (Amendment 9) of the Washington State Constitution.

Based on the foregoing it is hereby ordered:

1. Plaintiffs' motion for partial summary judgment is granted;

2. Plaintiffs are hereby awarded declaratory judgment that the tenant relocation assistance provisions codified in Sections 8, 9, and 10 of Seattle City Ordinance 112342 are invalid and may not be enforced against plaintiffs, their heirs, successors, or assigns.

3. Plaintiffs, their heirs, successors and assigns are hereby granted a permanent injunction prohibiting the City of Seattle from enforcing the tenant relocation provisions of the ordinance.

4. The City of Seattle is liable as a matter of law to plaintiffs for all damages which plaintiffs may have sustained as a proximate result of the city's enforcement of provisions of the ordinance invalidated by this summary

judgment as may be proved at the time of trial and plaintiffs' claim for reasonable attorney fees is reserved for subsequent determination.

5. The clerk is ordered to dispurse to plaintiff all funds held in this cause.

6. There is no just reason to delay the entry of this judgment and the court expressly directs that it be entered as a final judgment pursuant to the provisions of CR 54(b).

DONE IN OPEN COURT this __ day of DEC 7-1987 1987.

/s/ Richard M. Ishikawa
JUDGE

Presented By:

/s/ Richard B. Sanders
RICHARD B. SANDERS
Attorney for Plaintiffs

Copy Received:
/s/Vicki J. Toyohara
Vicki J. Toyohara
Attorney for Defendant
The City of Seattle

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 86-2-20459-8

R/L ASSOCIATES, INC.

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant,

THE CITY OF SEATTLE, a municipal corporation,

Third Party Plaintiff,

vs.

ROBERT HAZELBROOK, JANE DOE HAZELBROOK, and their marital community,

Third Party Defendants.

JUDGMENT OF CONTEMPT

The undersigned Judge of the above-entitled court being fully apprised of the premises herein does now

ORDER, ADJUDGE AND DECREE as follows:

1. The City of Seattle, Holly Miller, and Ovid Thompson should be and hereby are found in contempt of this court for violating Paragraph 3 of the summary judgment entered by this court on December 7, 1987 permanently enjoining the City of Seattle from enforcing the tenant relocation provisions of the subject ordinance.

2. Judgment should be and hereby is rendered against the City of Seattle, Ovid Thompson and Holly Miller in the amount of $500 to compensate plaintiff for reasonable attorney fees and costs of litigation incurred with respect to this contempt action.

DONE IN OPEN COURT this 9th day of March, 1988.

/s/ Richard M. Bates
JUDGE

Presented By:

/s/ Richard B. Sanders
RICHARD B. SANDERS
Attorney for Plaintiffs

Approved as to form:
/s/ Vicki J. Toyohara
Vicki J. Toyohara
Assistant City Attorney
Attorney for Defendant

ORDINANCE 112342

AN ORDINANCE regulating and licensing the demolition and change of use of residential structures, providing eviction protections and requiring relocation assistance for tenants displaced by the demolition and change of use of residential structures, appropriating funds in the Low Income Housing Replacement Fund, authorizing implementation of a low income housing program, providing penalties for violations, and repealing Ordinance No. 109220 as amended.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. **Short Title**. This Ordinance shall be cited as the "Housing Preservation Ordinance."

Section 2. **Findings and Purpose**.

A. **Findings**

1. Among the most substantial environmental impacts of property development and redevelopment in Seattle are the loss of housing and the displacement of low income people who are unable to pay for the costs of relocation.

2. The supply of housing, especially those rental housing units available to the City's low and moderate income residents, is being steadily diminished by demolition and change of use. The housing market has been unable to replace rental units and, particularly, low income units which have been demolished or changed to a nonresidential use.

3. Tenants displaced when their housing units are demolished or changed to a different use are increasingly unable to locate decent, safe and sanitary rental housing.

4. The loss of rental housing units has exacerbating an already critical rental housing shortage.

5. The loss of housing, especially rental housing, has been particularly severe downtown where more than 15,000 units have been lost since 1960, and the gap between the number of downtown jobs and the number of downtown housing units has increased enormously during this period.

6. Outside of downtown the low income housing demolition pressures have been greatest in the manufacturing and commercial zones and in the more intensive residential zones.

B. **Purposes**

Based on the above findings, the purposes of this Ordinance are as follows:

1. To mitigate the loss of scarce housing resources caused by redevelopment and change of use;

2. To ensure the replacement downtown of at least a portion of the housing being lost downtown;

3. To encourage replacement of lost units with units affordable to low-income persons;

4. To provide relocation assistance to low-income persons displaced by demolition or change of use.

Section 3. Definitions

A. Agent: Any person, firm, partnership, association, joint venture, corporation or other entity or combination of entities who represent or act for or on behalf of others.

B. Block: The entire property between three or more intersecting or intercepting platted streets, or between a platted street and a railroad right-of-way or a waterway, provided that such distance does not extend more than four hundred feet on either side of a lot.

C. Change of Use: The conversion of any housing unit from a residential use to a non-residential use. The lease of any housing unit by a licensed health care or medical research facility to provide housing for patients and/or their families in accordance with an approved Major Institutions Master Plan developed pursuant to Chapter 23.80 of the Seattle Municipal Code shall not be considered a change of use.

D. Demolition: The destruction of any housing unit or the relocation of an existing housing unit or units to another site.

E. Director: The Director of the Department of Construction and Land Use.

F. Downtown: That portion of the City between the waterfront and Interstate Five and between Royal Brougham Way and Denny Way.

G. Housing Unit: Any dwelling unit, housekeeping room, or guest room as defined in the Seattle Housing Code (Chapter 22.204 of the Seattle Housing Code); provided, that any housekeeping room or guest room which can be shown by the owner, to the satisfaction of the Director, to have been last used for at least five years as non-residential lodging shall not be considered a housing unit under this Ordinance.

H. Low-income Rental Housing: Any rental housing unit which is rented to low-income tenants at rents not to exceed 30 percent of 50 percent of the median income for comparably sized households in the Seattle-Everett Standard Metropolitan Statistical Area as defined by the United States Department of Housing and Urban Development (hereinafter "Seattle Everett SMSA").

I. Low-income Tenant: Any tenant whose total household income is less than 50 percent of the median

income for comparably sized households in the Seattle-Everett SMSA.

J. Major Educational Institution: All educational institutions that are designated as "Major Institutions" in Section 23.48.02 of the Seattle Municipal Code, or any amendments or successors to that section.

K. Net Residential Area: The total number of square feet of living space in a building based upon the interior dimensions of each housing unit and excluding stairwells, halls, lounges and other common areas.

L. Non-required Parking Lot: One or more parking spaces not required by either The Land Use Code (Title 23 SMC) or The Zoning Code (Title 24 SMC) as accessory to a principal use and not imposed as a mitigating measure pursuant to the State Environmental Policy Act. Parking spaces proposed for major institutions shall be considered "non-required" if the added spaces would result in the entire institution exceeding the minimum number of spaces required by the Major Institution zoning code.

M. Non-residential Lodging: Any housekeeping room or guest room which is licensed by the State of Washington under the Transient Accommodations Act and is generally not occupied by the same person for more than thirty days.

N. Notice: A written notice unless otherwise specified.

O. Owner: Any person, firm, partnership, association, joint venture, corporation or other entity or combination of entities who undertakes the demolition or change of use of any housing unit. The word "owner" shall also include agents and any other person acting on the owner's behalf.

P. Person: Any individual, corporation, partnership, association or other legal entity.

Q. Rental Unit: Any housing unit as defined in this Ordinance which was last occupied or is occupied pursuant to a lawful rental agreement, oral or written, express or implied.

R. Tenant: Any person who occupies a housing unit pursuant to a lawful lease or rental agreement, whether oral or written, express or implied. For the purposes of this Ordinance two or more persons who live together in a rental unit shall be considered one tenant.

Section 4. **Application of Ordinance**. This ordinance shall apply to demolition and change of use of all housing units, as defined herein, in the City of Seattle with the exception of the following:

A. Any housing unit ordered demolished by the Director because of damage caused by civil commotion, malicious mischief, vandalism, tenant waste, natural disaster, or other destruction beyond the owner's control;

B. Any housing unit owned by the Seattle Housing Authority;

C. Any detached single family house which has not been occupied by a tenant for at least a year and which will be replaced by a detached single family house or will be relocated for residential use to another site within the City.

Section 5. **Requirements for Housing Demolition and Change of Use.** Prior to the demolition or change of use of any housing unit to which this Ordinance applies as indicated by Section 4, an owner must obtain a Housing Demolition License. The Director shall issue a Housing Demolition License upon the Owner's compliance with the following requirements:

A. Obtain a permit for an appropriate replacement use as set forth in Section 6.

B. File an application for a Housing Demolition License as provided in Section 7.

C. Comply with tenant notice, eviction and relocation assistance requirements as provided in Sections 8, 9 and 10 and submit verification to the Director.

D. Comply with the housing replacement requirements as provided in Sections 11, 12, and 13, secure certificate of such compliance from the Director of the Department of Community Development and submit to the Director.

Section 6. **Replacement Use Permit Requirement.** An owner seeking a Housing Demolition License for demolition or change of use must first obtain a use permit for an appropriate replacement use; provided, that a demolition license shall not be issued if the replacement use is a non-required parking lot; provided further, that a use permit shall not be required when demolition is ordered by the Director for reasons of health and safety; and provided further, that a use permit shall not be required when housing units are being relocated for residential use to other sites within the City.

Section 7. **Housing Demolition License Application.** The Housing Demolition License Application shall be according to a form established by the Director and shall include:

A. A statement certifying the number of housing units to be demolished or changed in use and the net residential area to be lost.

B. A list containing the name of each tenant currently residing in the structure to be demolished or changed and containing the last name and last known address of each tenant who resided in the structure during the 180-day period immediately preceding the date of application for the housing

demolition license, indicating those tenancies which were terminated and the reason for each termination.

C. Written verification of compliance with the tenant notice, eviction and relocation assistance requirements of Sections 8, 9, and 10 of this Ordinance.

D. Written certification from the Director of Community Development that replacement housing, as required by Sections 11, 12, and 13 of this Ordinance, will be provided.

E. The use permit for the replacement use.

Section 8. **Tenant Notice**. At least 120 days before issuance of a Housing Demolition License, the owner must deliver to each tenant in the building to be demolished or changed in use written notice of his intention to apply for a Housing Demolition License and a relocation assistance certification form; provided, that nonprofit major educational institutions need not give such notice to students, faculty or staff who occupy housing owned by such institutions which is located within the institution's boundaries. The notice, which shall be a form provided by the Director, shall describe the relocation benefits available to eligible tenants and shall explain the tenant's right to remain in possession until demolition unless evicted for cause as defined in Section 9 of this Ordinance. Notice shall be delivered to each tenant personally and written acknowledgement of service on the tenant shall be secured, or notice shall be delivered by registered or certified mail with return receipt requested. In addition, a copy of the notice shall be posted at every entrance to the building.

Section 9. **Tenant Evictions.** For one hundred eighty days prior to application for a housing demolition license for housing units, tenants in those units shall be evicted only for failure to pay rent after service of a three-day notice to pay rent or vacate pursuant to RCW 59.12.030(3), for failure to comply with reasonable terms of a lease or rental agreement after service of a ten-day notice pursuant

to RCW 59.12.030(4), or for destroying property or creating a nuisance after service of a three-day notice pursuant to RCW 59.12.030(5). Any tenant evicted contrary to the requirements of this section shall be entitled to relocation assistance as provided in Section 10 of this Ordinance.

Section. 10. **Relocation Assistance.**

A. With the exception of students, faculty or staff who are the tenants of nonprofit major educational institutions inside major institutions boundaries, tenants whose household income is at or below 80 percent of median household income and who are displaced by demolition or change of use shall be relocated by the owner at the owner's expense into comparable housing in a comparable location at comparable rent as approved by the Director.

B. In lieu of such relocation, an owner may elect to pay to the tenants, at least five days before the date they are required to vacate, a relocation assistance payment in the amount of:

1. For a single tenant: $1,500 when income is at or below 50 percent of the Seattle-Everett SMSA median income; $750 when income is between 50 percent and 80 percent of the median income;

2. For tenants whose household contains two or more people: $2,000 when household income is at or below 50 percent of the median income; $1,000 when household income is between 50 percent and 80 percent of median income.

Relocation assistance shall be in addition to the refund of any deposits or other sums to which the tenant is lawfully entitled.

C. If the owner elects to make relocation assistance payments, then either the owner or the tenant may elect to have such payments made in the form of excused rent payments. Owners shall give each

tenant written notice in advance of his or her entitlement to relocation assistance in the form of excused rent. Tenants shall receive, at least five days before the date they are required to vacate, the difference between the set off rent and their full relocation entitlement.

D. Each tenant claiming relocation assistance shall submit to the owner, within 30 days of receipt of the relocation assistance certification form, a sworn, notarized statement setting forth the tenant's total annual gross income for the previous calendar year and the total gross income for the year in which the statement is submitted. The statement shall be on a form provided by the Director and shall be delivered to the tenants with the tenant notice required by Section 8 of this Ordinance. The owner may challenge the income verification of any tenant by submitting to the Director proof of income not disclosed by the tenant.

E. Any tenant who refuses to provide information regarding his or her income when requested by the Director or any tenant who misrepresents any information regarding income or entitlement to relocation benefits shall be denied relocation assistance.

F. Owners shall not be required to pay relocation assistance to eligible tenants when the tenant establishes tenancy in the unit after the one hundred twenty days' notice required by Section 8 was delivered to the tenants in the building; provided, that the owner must advise the tenant, in writing, prior to the tenant's acceptance of tenancy, that the unit will be demolished within one hundred twenty days. Any eligible tenant who is not advised of the intended demolition shall be entitled to full relocation benefits.

Section 11. **Housing Replacement Requirement.**

A. **Replacement Ratios**. Owners who demolish or convert housing to another use in the City shall replace the net residential area demolished or converted as follows:

1. **Downtown.** Housing demolished or converted shall be replaced downtown with 100 percent of the net residential area demolished or converted; provided, that the Director may, in his discretion, approve replacement housing that is within two blocks of downtown.

2. **HR, CG, BC, NC3, C1, and C2 Zones.** Housing demolished or converted shall be replaced anywhere in the City with 100 percent of the net residential area demolished or converted.

3. **MR Zones**. Housing demolished or converted shall be replaced anywhere in the City with 50 percent of the net residential area demolished or converted.

4. **L3, BI, BN, NC2 and NC1 Zones.** Housing demolished or converted shall be replaced anywhere in the City with 35 percent of the net residential area demolished or converted.

5. **M, IG, and IH Zones**. Housing demolished or converted shall be replaced anywhere in the City with 25 percent of the net residential area demolished or converted.

6. **L2, L1 and SF Zones.** No replacement is required.

B. **Alternative Methods of Replacement**. Replacement housing may be provided at the owner's election by: 1) relocation for residential use of the units to be replaced to another site, 2) construction

of new units, 3) rehabilitation of existing residential structures which can be shown to the Director's satisfaction to have been vacant continuously for five years prior to the date of application for a housing demolition license, or 4) the contribution to the Low Income Housing Replacement Fund provided for in section 14 of this ordinance. Under the fourth alternative, the contribution amount shall be based upon the cost at the time the contribution is made of providing low-income replacement housing in the area in which the replacement would be constructed (downtown for downtown housing, anywhere outside of downtown for other housing). That cost shall be calculated by multiplying one quarter of the net residential area required to be replaced pursuant to Section 11(A) by the estimated development cost (per net square foot) of newly constructed, average quality residential units in the area as determined yearly by the Director of the Department of Community Development. On the anniversary date of this Ordinance in each subsequent year, the Director of the Department of Community Development shall adjust the development cost factor up or down to reflect, as nearly as possible, the actual net square foot cost of constructing average quality residential units in the area.

C. **Rental Housing**. Rental housing that is demolished or converted shall be replaced with rental housing. Except as provided below, such replacement housing shall remain rental housing for a period of at least twenty years. Owners who provide replacement rental housing shall execute a monitoring agreement with the Director. After five years from the issuance of a certificate of occupancy of rental units, an owner may convert rental units to condominiums in accordance with the City's condominium conversion ordinance if the owner makes a contribution to the Low-Income Housing Replace-

ment Fund. The contribution shall be a prorated amount based on the square footage of housing units originally demolished or converted, the number of years left on the 20 year rental requirement and the dollar amount per net square foot which would be paid pursuant to subsection 11(B) of this Ordinance calculated as of the time of the buy-out.

D. **Low Income Replacement Housing Incentives.**

1. Owners who replace demolished or converted housing with Low-Income Housing shall provide one square foot of replacement net residential area for each four square feet of net residential area which would otherwise have been required under subsection 11(A) for non low-income replacement housing. Such housing shall remain low income housing for a period of at least 20 years subject to the buy-out provision for conversion of rental units to condominiums contained in subsection 11(C) above.

2. When the net residential area of Low-Income replacement housing constructed exceeds the net residential area of Low-Income Housing required pursuant to subsection D(1) above or when privately financed Low-Income Housing is constructed in the absence of any housing replacement requirement, the owner shall upon certification by the Director that such housing will remain low-income housing for twenty years, receive from the Director a Low-Income Replacement Housing credit certificate. The certificate shall specify the location of the housing and the total net residential area of the excess low income housing constructed. The credited area may, for a period of five years, be applied to reduce housing replacement requirements incurred by the owner or by others. Low-Income Replacement Housing credit cer-

tificates may not be used downtown unless the housing for which the certificate was issued was constructed downtown.

E. **Replacement Implementation.** Replacement housing shall be completed and ready for occupancy within three years of the date of issuance of the Housing Demolition License. Owners shall post a bond, letter of credit, set-aside letter or other security acceptable to the Director, in the amount of the contribution the owner would be required to pay to the Low Income Housing Replacement Fund if no replacement housing were provided pursuant to subsection 11(B). Should the required replacement housing not be constructed in the time period provided by this Ordinance, the bond or other security shall be forfeited and the proceeds placed in the Low Income Housing Replacement Fund. The three year housing replacement period may be extended if the Director determines that the owner has made reasonable progress toward constructing the housing but circumstances such as strikes, material shortages or weather caused delays which prevented completion of the replacement housing in the required three-year period. If an extension is granted, the Director may require the owner to post a bond or provide other security to assure that the replacement housing will be completed within the extension period granted.

F. **Joint Ventures.**

1) An owner may fulfill the housing replacement requirement by means of substantial participation in a verifiable, legally enforceable joint venture agreement with a for-profit or nonprofit developer.

2) Except for Low-income replacement housing as provided in subsection 11(D)(2), any joint venture agreement must be entered into and approved by the Director of Community

Development before the building permit is issued in connection with the non-residential development or within one year of issuance of the demolition permit or before issued in connection with the replacement housing, whichever occurs sooner.

3) An owner shall not receive replacement housing credits for housing units which have or will receive direct subsidy from other public or private entities. Replacement housing required by this Ordinance, a property use and development agreement or a Council conditional use permit shall not be credited to the replacement obligation of more than one owner.

Section 12. **Exceptions to Housing Replacement Requirement.**

A. The housing replacement requirement shall not apply to any housing unit continuously vacant since January 1, 1974.

B. The housing replacement requirement shall not apply when owners demolish or change the use of two or fewer structures containing four or fewer housing units in the same block. If more than two structures or more than four units are demolished or changed to a non-residential use on the same block, then the replacement requirements of Section 11 shall apply to all structures and units demolished or changed to a non-residential use including those that were or would have been exempted pursuant to this section.

C. The housing replacement requirement shall not apply to housing units owned by major educational institutions which were located within major institution boundaries and which were last used for student, faculty or staff housing prior to the effective date of this Ordinance. Other housing owned by educational institutions shall be subject

to the housing replacement requirement unless wholly or partially exempted from such requirement as part of a City-approved master plan. In determining the extent of such an exemption, the City Council shall consider the importance of the proposed institutional use of the affected property, the effect of the demolition or conversion on the supply of low-income housing and on the character of the neighborhood and the existence of alternatives to housing demolition or conversion.

D. The housing replacement requirement shall not apply to the demolition or change of use of any housing unit in a building subject to and referenced in housing mitigation conditions included in a property use and development agreement or Council conditional use permit approved by the City prior to the effective date of this Ordinance.

Section 13. **Administrative Relief from Housing Replacement Requirements.**

A. The Director may provide full or partial relief from the housing replacement requirement, if the owner establishes with clear and convincing proof that:

1. The literal interpretation and strict application of the housing replacement requirement of this Ordinance would prevent the owner from making profitable use of the property. "Profitable use of the property" shall not be the highest, best, or expectant use of the property but any use which may lawfully and reasonably develop on the property;

2. The requested relief would be consistent to the extent possible with the objectives of the Housing Preservation Ordinance and adopted Downtown Plan or component, as applicable;

3. The requested relief does not go beyond the minimum necessary to permit reasonable development of the property, and does not con-

stitute a grant of special privilege inconsistent with the limitations upon other similar properties.

B. When relief from the housing replacement requirement is sought, the Director shall request from the Director of the Department of Community Development a report and recommendation analyzing the owner's ability to make profitable use of property if the housing replacement requirement is imposed. The Community Development Director's report shall be made available to the owner and to any member of the public who requests it. The owner and any member of the public shall have fourteen days from the date the report is published to make comments to the Director concerning the appropriateness of the relief requested. Thereafter, the Director shall issue a written decision granting or denying administrative relief.

C. Decisions granting or denying administrative relief may be appealed by the applicant or any interested person pursuant to the following procedures:

1. Time of Filing. Appeals shall be filed with the Hearing Examiner by five o'clock p.m. of the fifteenth calendar day following issuance of notice of the decision. When the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the period shall run until five o'clock p.m. on the next business day. The appeal shall be in writing and shall clearly state the specific error or errors in the Director's decision and the specific relief sought. The appeal shall be accompanied by payment of the filing fee as set forth in Section 3.02.125 of the Seattle Municipal Code, governing Hearing Examiner Filing Fees. In form and content, the appeal shall conform with the rules of the Hearing Examiner.

2. Pre-hearing Conference. On the Hearing Examiner's motion, or at the request of any party of record, the Hearing Examiner may have a conference prior to the hearing in order to entertain pre-hearing motions, clarify issues, or consider other relevant matters.

3. Notice of Hearing. Notice of the Hearing on the appeal shall be mailed at least twenty days prior to the scheduled hearing date to parties of record.

4. Scope of Review. Appeals shall be considered de novo.

5. Standard of Review. The Director's decision shall be affirmed unless the Hearing Examiner finds such decision clearly erroneous.

6. Hearing Examiner's Decision. The Hearing Examiner shall issue a decision within fourteen days after closing the record and may affirm, reverse, remand or modify the Director's decision. Written findings and conclusions supporting the Hearing Examiner's decision shall be made.

7. Notice of Hearing Examiner's Decision. Notice of the Hearing Examiner's decision shall be mailed on the same date of the decision to the parties of record.

8. Appeal of Hearing Examiner's Decision. An appeal of any Hearing Examiner's decision must be filed in King County Superior Court within thirty days of the issuance of the decision.

Section 14. **Low Income Housing Replacement Fund.** All owner contributions pursuant to Section 11 of this Ordinance made in lieu of providing replacement housing, shall be deposited in the Low-Income Housing Replacement Fund created by Ordinance No. 109220. Monies deposited in the fund shall be used solely to assist in the production or rehabilitation of housing units for low income tenants.

The Mayor or his designee is hereby authorized to implement a program for producing and rehabilitating housing units for low income tenants with such funds. To effectuate such a program, all monies in the Low Income Housing Replacement Fund are hereby appropriated for such program and the City Comptroller is authorized to draw and the City Treasurer to pay the necessary warrants upon vouchers approved by the Mayor or his designee from appropriated funds.

Section 15. **Administration.** The Director shall administer and enforce the provisions of this ordinance and is authorized to adopt reasonable rules and regulations consistent with the ordinance to carry out his duties. Whenever an owner fails to comply with the provisions of this ordinance, the Director shall refuse the requested license.

Section 16. **Penalties.**

A. In addition to any other sanction or remedial procedure which may be available, any person violating any provision of this Ordinance or deliberately attempting to evade application of this Ordinance shall be subject to a civil penalty in the amount of $500.00 per day for each day of violation.

B. The penalties imposed by this Section shall be collected by a civil action brought in the name of the City and commenced in municipal court. The Director of Construction and Land Use shall notify the City Attorney in writing of the name of any person subject to the penalty. The City Attorney shall, with the assistance of the Director of Construction and Land Use, take appropriate action to collect the penalty.

Section 17. **Use Of Carry Over Subsidized Housing Area Credit.**

Notwithstanding any of the provisions of the Ordinance, owners of carry over subsidized housing area credits, as described in Section 10 of Ordinance 109220 as amended (Section 22.210.100 of the Seattle Municipal Code), for

which a certificate of occupancy was issued prior to the effective date of this Ordinance, may use those carry over credits to satisfy any housing replacement obligation that the owner, or any association or other legal entity in which the owner is a participant, may incur pursuant to this Ordinance; provided, that use of the carry over housing credits shall be governed by the housing demolition license fee reduction provisions described in Section 8 of Ordinance 109220, as amended (Section 22.210.080 of the Seattle Municipal Code). Any housing replacement obligation remaining after the carry over housing credits are expended shall be satisfied pursuant to the terms of this Ordinance.

Section 18. **Severability**. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this ordinance, or the invalidity of the application thereof to any person or circumstance shall not affect the validity of the remainder of this Ordinance, or the validity of its application to other persons or circumstances.

Section 19. Ordinance 109220, and its amendments, Ordinances 109432, 109973 and 110661 are hereby repealed.

Section . This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become law under the provisions of the city charter.

Passed by the City Council the 15th day of July, 1985, and signed by me in open session in authentication of its passage this 15th day of July, 1985.

/s/ Norman B. Rice
President of the City Council.

Approved by me this 19th day of July, 1985.

/s/ Charles Royer
Mayor.

Filed by me this 19th day of July, 1985.

Attest:/s/ Tim Hill
City Comptroller and City Clerk

(SEAL)

Published _____ By/s/ Theresa Dunbar
Deputy Clerk.

ORDINANCE 109220

AN ORDINANCE regulating and licensing the demolition and change of use of residential housing units, imposing a license fee to raise revenue, creating a Low Income Housing Replacement Fund, providing protection and assistance for displaced tenants, providing penalties for violations, and establishing a position in the Department of Construction and Land Use.

WHEREAS, for several years the vacancy rate for residential rental units in the City has remained less than three percent (3%); and

WHEREAS, projections indicate that there will be a steady increase in the number of households in need of rental housing for the foreseeable future; and

WHEREAS, a significant number of residential housing units, especially low and moderate income units, are lost each year to demolitions; and

WHEREAS, the loss of residential housing units is exacerbating an already critical rental housing shortage; and

WHEREAS, tenants displaced by demolitions, frequently on short notice, have been unable to find affordable housing and are increasingly unable to find any decent, safe and sanitary housing; and

WHEREAS, demolitions are imposing severe hardships upon all classes of displaced tenants but especially upon the elderly and those of low and moderate income with the result that an increasing number of tenants are becoming dependent upon governmental assistance; Now, Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. *Short Title.* This ordinance may be cited as the "Housing Preservation Ordinance."

Section 2. *Definitions.* As used in this ordinance, the following words and phrases shall have the following meanings:

(a) Average-Cost Rental Housing: Any housing unit which for a continuous period of five years or more will be rented at a rate equal to, or less than, the federal Section 8 Fair Market Rent for comparable units in the Seattle area, as determined by the Department of Housing and Urban Development.

(b) Change of Use: The conversion of any housing unit from a residential to a non-residential use.

(c) Housing Unit: Any dwelling unit, housekeeping room or guest room, as defined by the Seattle Housing Code (Ordinance 106319), which was not ordered vacated and closed to entry by the Director of Construction and Land Use pursuant to Chapter 5 of the Housing Code prior to January 1, 1980; Provided, that any housekeeping or guest room which can be shown by the owner, to the satisfaction of the Director, to have been used as non-residential lodging shall not be considered a housing unit under this ordinance.

(d) Low Income Tenant: A tenant, as defined herein, whose total household income and assets are at or below the federal Section 8 Income Eligibility Standards as determined by the Department of Housing and Urban Development.

(e) Net Residential Area: The total number of square feet of living space in a building based upon the interior dimensions of each housing unit and excluding stairwells, halls, lounges and other common areas.

(f) Non-required Parking Lot: Any parking spaces not required by the Zoning Ordinance (86300) as accessory to a principal use nor as a mitigating meas-

ure pursuant to the State Environmental Policy Act.

(g) Rental Unit: Any housing unit, as defined herein, which is occupied pursuant to a lawful rental agreement, oral or written, express or implied.

(h) Subsidized Housing: A housing unit in which the occupant receives a rent subsidy pursuant to the federal Section 8 Rent Subsidy Program, or a housing unit in which low income tenants are not required to pay more than 25% of their incomes for rent, and which will remain subsidized for a period of 20 years or more.

(i) Tenant: Any person who occupies a housing unit pursuant to a lawful lease or rental agreement, whether oral or written, express or implied. Two or more individuals who live together in a rental unit shall be considered one tenant for purposes of this ordinance.

(j) Director means the Director of the Department of Construction and Land Use or its successor department.

(k) Owner: Any person, firm, partnership, association, joint venture, corporation or other entity or combination of entities who undertakes the demolition of any residential housing unit in the City of Seattle. The term "owner" shall also include the owner's agent or other person acting on the owner's behalf.

(l) Person: Any individual, corporation, partnership, association or other legal entity.

(m) Agent: Any person, firm, partnership, association, joint venture, corporation or other entity or combination of entities who represent or act for or on behalf of another.

(n) Notice: A written notice unless otherwise specified.

(o) Demolition: The destruction of any housing unit.

(p) Residential use: The use of any housing unit designed, arranged, intended, occupied, maintained, leased, or rented as the primary residence of any person.

(q) Section 8 Housing: The Federal Government's Low Income Housing Assistance Program as codified in Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437F.

(r) Use Permit: A use permit as described in and required by the Seattle Zoning Ordinance (86300).

[AMENDED ORD 109432]

Section 3. *Application of Ordinance.* This ordinance shall apply to the demolition and change of use of all housing units, as defined herein, in The City of Seattle, including those demolished pursuant to any order, decision or other action of the Director. No owner shall cause the demolition of any housing unit without first obtaining a Housing Demolition License. Housing units which are the subject of demolition proceedings or a demolition order but which have not been demolished on the effective date of this ordinance shall be subject to the terms of this ordinance. Any housing unit ordered demolished by the Director because of damage caused by civil commotion, malicious mischief, vandalism, tenant waste, natural disaster, or other destruction beyond the owner's control shall not be subject to the terms of this ordinance. This ordinance shall not apply to the demolition of any housing unit owned by the Seattle Housing Authority or any public development authority or to the demolition of a detached single family house which will be replaced by a detached single family house.

Section 4. *Residential Housing Demolition License.* Before demolishing any housing unit, owners must first secure a use permit for the intended use of the property. After obtaining a use permit, owners must obtain a Housing Demolition License. When there is a proposed change

of use of any housing unit, owners must obtain a Housing Demolition License prior to obtaining a use permit. No Housing Demolition License shall be issued by the Director until owners have fully complied with the requirements of this ordinance. The Director shall not issue a Housing Demolition License or use permit when a housing unit or units are proposed to be demolished and no replacement use is proposed, or when the proposed replacement use is a non-required parking lot; Provided, that when demolition is ordered by the Director for reasons of health and safety a demolition permit shall be issued without the requirement of a use permit.

Section 5. *License Requirements.* To receive a Housing Demolition License every owner must:

(a) Submit to the Director a statement, on a form to be provided by the Director, certifying the number of housing units to be demolished and the net residential area to be lost by the demolition.

(b) Submit a list containing the name of each tenant currently residing in the structure to be demolished and a list of the name and last known address of each tenant who has resided in the structure during the 120 days immediately preceding the date of application, indicating those whose tenancies were terminated and the reason for each termination.

(c) Submit written verification of compliance with the tenant notice, eviction and relocation assistance requirements of Sections 11, 12, 13, 15, and 16 of this ordinance.

(d) Submit the Housing Demolition License fee as provided in Section 7 of this ordinance.

(e) Except in the case of a proposed change of use, secure a use permit.

Section 6. *Housing Cost Index.* The Director shall compute and publish a housing cost index for replacement

housing by multiplying the monthly federal Section 8 Fair Market Rent for one bedroom walk-up rental units, as determined by the Department of Housing and Urban Development, by 240 and dividing the product by 600. The resulting number shall be the housing cost index.

Section 7. *Computation of Housing Demolition License Fee.* The Housing Demolition License fee shall be computed by multiplying the net residential area to be demolished by the Housing Cost Index. The product of these numbers shall be the replacement cost for the demolished units. When housing units are demolished in Single Family Residence (RS), Residential Duplex (RD), Multiple Residence Lowest Density (RM 1600), Residence Waterfront (RW), General Industrial (IG), Manufacturing (M) or Heavy Industrial (IH) zones, as described in the Zoning Ordinance (86300), owners shall pay a license fee of 3% of estimated replacement costs. When housing units are demolished in a Multiple Residence Low Density (RM 800), Neighborhood Business (BN), or an Intermediate Business (BI) zone, as described in the Zoning Ordinance (86300), owners shall pay a license fee of 5% of estimated replacement costs. When housing units are demolished in any Multiple Residence High Density Variable Height (RMV) or in a Multiple Residence High Density (RMH) zone, as described in the Zoning Ordinance (86300), owners shall pay a license fee of 13% of estimated replacement costs. When housing units are demolished in a General Commercial (CG) or Community Business (BC) zones owners shall pay a license fee of 17% of estimated replacement costs. When housing units are demolished in a Metropolitan Commercial (CM), Metropolitan Commercial Temporary (CMT), or Multiple-Residence-Mixed Density (RM-MD) zone, as described in the Zoning Ordinance (86300), owners shall pay a license fee of 20% of estimated replacement costs. When no more than two adjacent single family houses are demolished in RS, RD, RW, RM, IG, M, IH, BN and BI zones, no license fee shall be required but all other provisions of this ordinance shall apply. When more than two adjacent single family houses are demolished, the license fee shall be com-

puted based upon the total square feet of housing demolished.

Section 8. *Fee Reductions for Certain Replacement Uses.* The Housing Demolition License fee computed pursuant to Section 7 of this ordinance shall be reduced when demolished housing units are replaced by new housing units. When demolished housing units are replaced by subsidized housing, the license fee shall be reduced by subtracting from the net residential area to be demolished the number of square feet of net replacement subsidized housing. When demolished housing units are replaced by housing units whose rents or monthly mortgage payments do not exceed monthly Section 8 fair market rents for comparably sized housing units in the Seattle area, the license fee shall be reduced by subtracting from the net residential area to be demolished, 90% of the net number of square feet of replacement housing. When housing units are replaced by housing units whose rents or monthly mortgage payments exceed monthly federal Section 8 Fair Market Rents the license fee shall be reduced by subtracting from the net residential area to be demolished 50% of the net number of square feet of replacement housing. When calculating fee reductions pursuant to this section, the net residential area of replacement housing subtracted from the net residential area of demolished housing shall not exceed the net residential area of demolished housing. When an owner relocates the structure to be demolished to another site in the City at his sole cost and expense, the license fee shall be reduced by 100%. In all other cases and whenever the housing replacement use is not under construction within three years following issuance of a Housing Demolition License the full license fee as determined in Section 7 of this ordinance shall be required. If another use permit is subsequently issued for the same site then the license fee shall be recomputed based upon the proposed new use.

Section 9. *Demolition Ordered by Director.* Whenever the Director shall order any housing unit demolished for reasons of health and safety, the owner shall be obligated to pay the Housing Demolition License fee required by

Section 5, 6 and 7 of this ordinance except when demolition is necessitated by vandalism, malicious mischief, tenant waste, natural disaster, civil commotion, or other destruction beyond the control of the owner. Whenever the license fee or any portion thereof is not paid on or before the date of the demolition by the Director, the amount owing shall be reduced to judgment by the City Attorney and made a lien against the real property.

Section 10. *Subsidized Housing.* To qualify as a subsidized housing replacement under Section 8 of this ordinance, the owner must present proof of a final commitment for subsidization from the Department of Housing and Urban Development or other proof acceptable to the Director that the replacement units will be subsidized housing. An owner who builds any subsidized housing within the City after the effective date of this ordinance may set off the net residential area of the subsidized housing constructed against the net residential area lost through demolition on any property of the owner. Any amount of net residential area of subsidized housing which is in excess of net residential area demolished may be carried over and applied to future demolitions.

Section 11. *Tenant Evictions.* For 120 days prior to issuance of the Housing Demolition License for any housing unit, tenants in those units shall be evicted only for failure to pay rent after service of a three day notice to pay rent or vacate pursuant to RCW 59.12.030(3); for failure to comply with reasonable terms of a lease or rental agreement after service of a ten day notice pursuant to RCW 59.12.030(4), or for destroying property or creating a nuisance after service of a three day notice pursuant to RCW 59.12.030(5).

Section 12. *Relocation Assistance.* Tenants displaced by demolition or change of use shall receive from the owner, at least five days before the date they are required to vacate, a relocation assistance payment in the following amount:

(a) Low income tenants shall receive $1,000;

(b) Tenants whose household income exceeds 80% of median household income but is less than 160% thereof shall receive an amount calculated as follows:

$$\frac{\text{80\% of median household income}}{\text{Tenant's household income}} \times \$1{,}000$$

not to exceed $1,000;

(c) Tenants whose household income exceeds 160% of median household income shall receive no relocation assistance payment.

Relocation assistance payments shall be in addition to the refund of any deposits or other sums to which the tenant is entitled. At the option of the owner or the tenant, relocation assistance shall be paid in the form of excused rent payments. Owners shall give each tenant written notice in advance of his or her entitlement to relocation assistance in the form of excused rent. Tenants who vacate prior to receiving full relocation assistance in the form of reduced rents shall receive, at least five days before the date they vacate, the difference between the set off rent and their full relocation entitlement. Each tenant claiming relocation assistance shall submit to the owner, within 30 days of receipt of notice of entitlement, a sworn, notarized statement setting forth the tenant's total annual gross income for the previous calendar year and the total gross income for the current year when the statement is submitted. The statement shall be on the form provided by the Director and shall be delivered to the tenants with the tenant notice required by Section 16 of this ordinance. The owner may challenge the income verification of any tenant by submitting proof to the Director of income not disclosed by the tenant. Any tenant who refuses to provide information regarding his or her income when requested by the Director, or any tenant who misrepresents any information regarding relocation benefits, shall be denied relocation assistance.

Section 13. *Relocation Assistance Exceptions.* Owners shall not be required to pay relocation assistance to eligible tenants when:

(a) The owner, at the owner's expense, relocates the tenant into a housing unit acceptable to the tenant.

(b) The owner secures temporary housing acceptable to the tenant during rehabilitation or construction and guarantees the tenant a unit in the replacement structure acceptable to the tenant.

(c) The tenant's tenancy is terminated for good cause pursuant to Section 10 of this ordinance.

(d) The tenant receives relocation benefits under state or federal law.

(e) The tenant establishes tenancy in the unit after the 120 days notice required by Section 16 of this ordinance was delivered to the tenants in the building: provided, that the owner must advise the tenant, in writing, prior to the tenant's acceptance of tenancy, that the unit will be demolished within 120 days. Any eligible tenant who is not advised of the intended demolition shall be entitled to full relocation benefits.

Any owner seeking an exemption from the relocation assistance requirements of this ordinance based upon the exceptions in Section 13(a) and (b) must secure from the tenant a written waiver of relocation assistance on a form which shall be provided by the Director which states the basis for the waiver. No waiver of relocation assistance shall be permitted for any reason other than those enumerated in Section 13 of this ordinance.

Section 14. *Tenant Notice.* At least 120 days prior to issuance of a Housing Demolition License, the owner must deliver to each tenant in the building written notice of his intention to apply for a Housing Demolition License and the relocation assistance certification form described in Section 12 of this ordinance. The notice, which shall be in a form provided by the Director, shall describe the relocation benefits available to eligible tenants and shall

explain the tenant's right to remain in possession unless evicted for just cause. Notice shall be delivered to each tenant personally and written acknowledgement of service by the tenant shall be secured, or notice shall be delivered by registered or certified mail with return receipt requested. In addition, a copy of the notice shall be posted at every entrance to the building.

Section 15. *Housing Replacement Fund.* There is hereby created in the City Treasury a Housing Replacement Fund into which all Housing Demolition License fee payments made pursuant to Sections 5 and 6 of this ordinance shall be deposited. Money deposited in the fund shall be used only for costs related to production of housing for low income persons. All appropriations from the fund shall be authorized by the City Council by ordinance.

Section 16. *Administration.* the Director shall administer the provisions of this ordinance and is authorized to adopt reasonable rules and regulations consistent with the ordinance to carry out his duties. Any violation of this ordinance shall be reported to the Director who shall investigate the complaint and take whatever action he deems necessary. Whenever an owner fails to comply with the provisions of this ordinance, the Director shall refuse the requested license.

Section 17. There is hereby established in the Department of Construction and Land Use at the salary rate provided for like positions in the Salary Ordinance, one position of Research and Evaluation Assistant, and the Director is authorized to fill the position subject to Civil Service laws and rules.

Section 18. *Penalties.* Violation of Section 4, 10, 11 or 15 of this ordinance or any deliberate attempt by an owner to evade application of this ordinance, or any misrepresentation of a material fact in any application or other writing required by this ordinance shall constitute violations subject to the provisions of Chapter 12A.01 and Chapter 12A.02 of the Seattle Criminal Code (Ordinance 102843), and any person convicted thereof may be pun-

ished by a civil fine or forfeiture not to exceed Five Hundred Dollars ($500.00). Each day's violation of any provision of this ordinance shall constitute a separate offense.

Section 19. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this ordinance, or the invalidity of the application thereof to any person or circumstance shall not affect the validity of the remainder of this ordinance, or the invalidity of its application to other persons or circumstances.

Section 21. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 21 day of July, 1980, and signed by me in open session in authentication of its passage this 21 day of July, 1980.

/s/ Paul Kraabel
President ____of the City Council.

Approved by me this 24 day of July, 1980.

/s/ Charles Royer
Mayor.

Filed by me this 24 day of July, 1980.

Attest: /s/ Tim Hill
City Comptroller and City Clerk.

(SEAL)
Published ____

By /s/ Dorothy L. McFarlin
Deputy Clerk.

3.06.050 Director—Fees and charges.

The Director of Construction and Land Use shall charge such fees for licenses, permits, inspections, reviews and other services and approvals as may be provided by ordinance.

(Ord. 109124 § 6, 1980.)

(3)

No. 92-487

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

v.

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

A writ of certiorari is sought to review three questions raised by the *Robinson* and *Sintra* opinions of the

Washington State Supreme Court. The questions for which review is sought are summarized:

(1) Does an unduly oppressive land use regulation violate Fourteenth Amendment Due Process guarantees?

(2) Does continued enforcement of a land use ordinance after it has been declared facially invalid by a state trial court deprive property owners of their property without Fourteenth Amendment Due Process?

(3) Do governmental officials violate a clearly established constitutional right so as to lose qualified immunity under 42 U.S.C. § 1983 when they continue to enforce a local ordinance after it has been determined facially invalid by a court of competent jurisdiction?

Respondents' agree that the first question merits issuance of the writ to consider not only that question but related takings, due process, and 42 U.S.C. § 1983 questions raised in respondents' cross-petition. However the Washington Supreme Court's disposition of the second and third question is clearly justified by settled law and merits no further review.

1. This Court Should Grant Certiorari to Review Washington Supreme Court's Disposition of Unduly Oppressive Land Use Regulations.

Petitioners are right that review should be granted of this question, but for the wrong reasons. *Lawton v. Steele*, 152 U.S. 133 (1984) holds that the means to achieve

an otherwise legitimate end must be reasonably necessary to accomplish the purpose and not be "unduly oppressive upon individuals." *Lawton* at 137. This is a test of means, not ends, which "is still valid today . . . " *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

The test does not purport to define the legitimacy of ultimate police power objectives but rather to impose limitations on the means employed.

Here the means employed was found to be "unduly oppressive" because the HPO would shift to the shoulders of a few land owners the responsibility to cure the complex problems of housing availability by those of limited means. The problem is not new. See e.g. *Pennell v. San Jose*, 485 U.S. 1 (1988). However it is the problem of society as a whole, not just the respondents in this case. The analog to the issue raised by petitioners is identified in the cross-petition of the respondents: Is an ordinance which is unduly oppressive because it improperly shifts the costs of solving a social problem to the shoulders of present land owners a taking as well because it forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole?" *Armstrong v. United States*, 364 U.S. 40, 48 (1960). Further, the question must inevitably arise that if HPO deprives an owner of his property without due process can the owner be deprived his remedy under 42 U.S.C. § 1983, as the Washington Supreme Court so held? Any constitutional deprivation, under color of law, would seem to plainly merit the § 1983 remedy without qualification. *Monroe v. Pape*, 365 U.S. 167 (1961); *Carey v. Piphus*, 435 U.S. 247 (1978); *Owen v. Independence*, 445 U.S. 622 (1980); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

2. Does Continued Enforcement of a Land Use Ordinance After it Has Been Declared Facially Invalid Also Violate Due Process?

While holding that the HPO facially deprives owners of their property without due process because of its unduly oppressive nature, the Washington Supreme Court nevertheless does not allow the remedy provided by § 1983. The § 1983 remedy is limited by the Washington court to a separate due process violation arising from continued enforcement of an ordinance after it was declared facially invalid.

Factually HPO I was declared facially invalid by the trial court in 1983. The City did not attempt to stay enforcement of the judgment nor appeal the judgment. Rather the City continued enforcement through the summer of 1985 when it replaced HPO I with an almost identical HPO II. In the summer of 1986 the license fee provisions of HPO II were again found facially invalid, a determination from which the City appealed however did not seek to stay. The City again continued enforcement (imposing a $219,000 license fee on Sintra in the meantime) until April 1987 when the State Supreme Court affirmed the trial court.

Thereafter the City repeated its pattern of enforcement when it contemptuously violated a permanent injunction against any enforcement of the tenant relocation provisions of HPO II imposed by the trial court in December 1987 until it, and its enforcement officers, were held in contempt of court in March 1988 for their conduct. *R/L v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989).

The City seems to argue it may disregard trial court decrees of facial invalidity with impunity whether or not it even files an appeal. However even the pendency of an appeal does not negate the preclusive effect of a Washington trial court judgment. *Riblet v. Ideal Cement Company*, 57 Wn.2d 619, 621, 358 P.2d 975, 977 (1961); *Seattle National Company v. Gilmore*, 167 Wash. 102, 9 P. 95 (1932); Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 824 (1985).

The City's wilful, deliberate, and malicious enforcement of these ordinances after they had been declared facially invalid is clearly a due process violation and the Washington Supreme Court was correct to so hold.

3. Qualified Immunity to Suit Under 42 U.S.C. § 1983 is Not Dependent Upon Subjective Legal Advice.

Whether or not an official is entitled to qualified immunity under 42 U.S.C. 1983 depends on whether or not he violated "clearly established statutory or constitutional rights" of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test is an objective one. No post-*Harlow* Supreme Court decision substitutes the subjective state of the actor's mind, whether prompted by advice of counsel or otherwise, to determine the availability of the qualified immunity defense.

Thus the Washington State Supreme Court was clearly correct when it held in both *Sintra* and *Robinson* that the advice of counsel, per se, does not establish the right to successfully claim qualified immunity. The court

remanded this matter to the trial court for factual development.

Moreover the record discloses a weak, if existent, claim that the City and its enforcement officers were following the advice of counsel by continued enforcement of the HPO, court decrees notwithstanding. For example, there is no written memorandum in the record conveyed to the City or any of its enforcement officers from the Seattle City Attorney's office providing any reasoned analysis whatsoever disagreeing with any of the three trial court conclusions that the ordinance was facially invalid. Rather the nature of the "advice", insofar as it could be characterized as such, is a tactical decision to continue enforcement to reap ill-gotten gains rather than a reasoned disagreement with the rational of the trial court decisions, not to mention direct and/or collateral estoppel effect per se. In point of fact, the "advice" paid off because the Washington Supreme Court barred approximately one-half of the claims of the *Robinson* class finding that the statute of limitations had run on all payments made before May 1985.

Seattle City Attorney James Fearn, in a seminar context, candidly explained that while courts would have "no problem" finding a taking under the HPO " . . . *Nollan* [*v. California Coastal Commission*, 483 U.S. 825 (1987)] and the constitution do not get to the permit counter." (*Robinson* CP 122)

In contrast, the record discloses many legal memorandums submitted to City employees with HPO enforcement responsibilities (from nonCity attorneys) setting forth in exhaustive detail HPO invalidity. So if

employees were entitled to rely upon "legal advice," they disregarded it when it came from outside sources.

In fact the record discloses that enforcement officers acted contrary to the advice of the City attorney when they declined to provide full administrative relief to Sintra. *Sintra, supra* at 26.

The issue of qualified immunity was correctly decided by the Washington Supreme Court and does not merit further review.

CONCLUSION

Certiorari should be granted on "overly oppressive" due process violations and related takings and 42 U.S.C. § 1983 issues raised by cross-petitioners. Certiorari should be denied on other issues.

Respectfully submitted,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF SEATTLE

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INTEREST OF AMICUS CURIAE

Amicus curiae, the City of Bellevue, Washington, is a general purpose municipal corporation located across Lake Washington from the City of Seattle. It is the fourth largest city in the State of Washington, with a population of approximately 85,000. It is organized and operates under Revised Code of Washington Chapter § 35A, the Optional Municipal Code, under which it has the " . . . broadest powers of local self government consistent with the Constitution of this state." Wash. Rev. Code 35A.01.010. Under Wash. Rev. Code Chapter 35A.63, Bellevue has comprehensive power to plan, zone and regulate land uses within its jurisdiction.

Amicus curiae Snohomish County is a municipal corporation and political subdivision of the State of Washington located directly north of the City of Seattle. It is the third largest county in the state, encompassing approximately 2098 square miles and containing approximately 484,000 residents. It is a home rule charter county organized under Article XI, § 4 of the Washington State Constitution. Under authority of state statute, Snohomish County enacts ordinances and other land use controls to regulate the physical development of the county. *See* Wash. Rev. Code Chapter 36.70.

As municipal corporations responsible for such land use functions, like all other cities, towns and counties within the state, Bellevue and Snohomish County are directly and adversely affected by the decisions of the Washington Supreme Court which are the subject of the City of Seattle's Petition for Writ of Certiorari in this matter. Seattle, Bellevue, Snohomish County and other

cities, towns and counties have a common interest in the outcome of this case.

SUMMARY OF ARGUMENT

1. The Washington Supreme Court's Test For Qualified Immunity Conflicts With This Court's Precedents, And Fails To Accord Recognition To The Attorney/Client Relationship.

Under the case law of the United States Supreme Court, local government officials are entitled to a qualified, or "good faith," immunity from liability for damages resulting from their official acts " . . . as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Local government officials should and, in fact, must rely on the advice of legal counsel to ascertain the legality of their proposed actions before taking those actions. *See, e.g.*, Wash. Rev. Code § 36.27.020(2). Where local government officials have sought such legal advice, and have been advised by their legal counsel that their proposed action is lawful, courts should, at the very least, engage in a strong presumption that such officials are entitled to qualified immunity. It is important to government and its officials that this court correct the Washington Supreme Court's misreading of this Court's cases and clarify that the fact that an official has sought and received official legal advice should be considered and given weight in determining whether qualified immunity applies. (Question Presented 3, Petition for Writ of Certiorari.)

2. The Washington Supreme Court's Substantive Due Process Test For Land Use Legislation Intrudes On The Legislative Power Of Local Government And Threatens To Create An Avalanche Of Litigation Over Local Land Use Regulations.

Robinson v. Seattle[1] and *Sintra, Inc. v. Seattle*[2] are the latest in a series of Washington Supreme Court cases in which that court, by adopting the "unduly oppressive" test as an additional test in determining whether substantive due process has been violated, has gone well beyond the standards established by this Court for review of legislation under the fourteenth amendment. This test allows the reviewing court to intrude into the legislative realm and, in effect, act as a quasi-legislative body. These cases create uncertainty as to the validity of numerous laws and regulations at all levels of government, and they invite a flood of litigation over legislation that is plainly valid under this Court's precedents. (Question Presented 1, Petition for Writ of Certiorari.)

ARGUMENT

1. The Washington Supreme Court's Test For Qualified Immunity Conflicts With This Court's Precedents, And Fails To Accord Recognition To The Attorney/Client Relationship.

The concept that public officials should be immune from liability for damages resulting from their official

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[1] 119 Wash. 2d 34, 830 P.2d 318 (1992)

[2] 119 Wash. 2d 1, 829 P.2d 765 (1992)

actions is of ancient lineage. The immunity of legislators from actions taken in session was established in England by the Bill of Rights of 1689 and became firmly established in American law through article I, section 6 of the United States Constitution. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Judicial immunity is even more venerable, tracing its origins at least to the reign of Edward III (1327-1377). The immunity of the third branch, the executive, was in medieval England very broad; crown officers acted on behalf of the King and "the King could do no wrong." However, this absolute immunity was apparently on the wane even as early as the reign of William and Mary (1689-1695) as the law saw the gradual development of the "good faith," or qualified, immunity doctrine. *Scheuer v. Rhodes*, 416 U.S. 232, 239 n. 4 (1974).

Qualified immunity for administrative officials remains alive and well in the United States today. Underlying the doctrine is recognition of a fundamental policy perhaps best captured in Justice Jackson's terse statement, later quoted in this passage from *Scheuer v. Rhodes*, 416 U.S. at 241:

> *"It is not a tort for government to govern." Dalehite v. United States*, 346 U.S. 15, 97 L.Ed 1427, 73 S.Ct. 956 (1953) (dissenting opinion). Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they err. The concept of immunity assumes this and goes on to assume

> that it is better to risk some error and possible injury from such error than not to decide to act at all." (emphasis added)

The Supreme Court first concluded that the immunity doctrine applied to actions under 42 U.S.C. § 1983 in *Tenney v. Brandhove,* 341 U.S. 367 (1951), and has elaborated on the nature of that immunity in a series of cases since that time. In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the court rejected the prior dual test which considered both objective and subjective factors, eliminating the subjective test because, by nature, it injected questions of fact requiring resolution by a jury, precluding summary judgment and forcing a trial, and the concomitant time and expense, based on "bare allegations of malice." *Harlow,* 457 U.S. at 818. The court established the test as follows:

> We therefore hold the government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights a reasonable person would have known.

Harlow, 457 U.S. at 818.

The court went on to comment that:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate a subsequent legal development, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Harlow, 457 U.S. at 818.

The question, of course, that most often faces the government official is: How am I to know whether the law is

clearly established? It cannot be unreasonable for that official to turn to his legal counsel for advice. Land use regulation has become increasingly complex in recent years with the advent of ever more sophisticated laws designed to regulate growth and limit environmental degradation. Increasingly, land use regulations have become the subject of litigation. Lower courts regularly rule on challenges to land use regulations and their implementation. The implications of particular lower court rulings and their application to other parties or circumstances are often uncertain and complex. In this environment, legal advice has played an ever more important role. Government officials, as laypersons in the law, have no choice but to turn to their legal advisors when such legal issues arise. They should be allowed to rely on the legal advice of those lawyers who serve in an official capacity to advise them. *See, e.g.*, Wash. Rev. Code § 36.27.020(2) (county prosecutor to be legal advisor to all county officers in all matters relating to official business).

In this case, the question facing the officials responsible for administration of Seattle's Housing Preservation Ordinance was highly technical: did a trial court ruling invalidating the ordinance in a specific case prevent enforcement of the ordinance against non-parties to the case? The officials were thus faced with a pure legal question which, as non-lawyers, they had no expertise to resolve. If the trial court rulings did not bar all enforcement of the HPO, then city officials had a *duty* to enforce it. The Washington Supreme Court found that the officials had actual knowledge of the court rulings, and therefore "knowingly" violated the law by continued enforcement of the ordinance. *Robinson v. Seattle*, 119 Wash.2d at 67-68,

830 P.2d 318 (1992). What the court ignores is that, particularly for government officials who are not lawyers, actual knowledge of the existence of a court ruling is not the equivalent of knowledge of the meaning, scope and extent of the ruling[3]. They can learn that only through advice of legal counsel. They had no choice but to rely on the legal advice provided by their attorneys. Their only other choice would have been to refuse to enforce the ordinance, in which case they well could have been accused of disregarding their legally mandated responsibilities. If local government officials, in circumstances like those present here, cannot rely on the advice of their attorney, they may be inhibited from enforcing important laws and regulations by the mere assertion that a single trial court ruling casts doubt on their validity. In short, the effect would be to " . . . unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton,* 483 U.S. at 638. Only if they can act with assurance that they can rely on the advice of their expert advisors can public officials be expected to act with the vigor and evenhandedness that sound public policy requires. Yet the Washington Supreme Court held in *Robinson v. Seattle,* 119 Wash.2d 34, 830 P.2d 318 (1992) that advice from a public official's attorney is meaningless for immunity purposes under 42 U.S.C. § 1983. The effect of the ruling is that, in determining damage liability under federal law, an official will be deemed to have "knowingly" violated the law

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[3] The court also ignored the fact that even a knowing violation of a state court order is not a violation of a clearly established *federal* right. Otherwise, a § 1983 claim against individual officers would arise out of every dispute over the interpretation and effect of a state court ruling.

even though that official was advised by his or her counsel that the action would not violate the law and, indeed, was *required* by valid law. Under this approach, such officials would be required to conduct their own legal analysis of their lawyer's advice and would need to be better versed in the law than their lawyers.

2. The Washington Supreme Court's Substantive Due Process Test For Land Use Legislation Conflicts With This Court's Precedents And Intrudes On The Legislative Power Of Local Government.

Seattle has indicated in its Petition for Writ of Certiorari how the Washington Supreme Court has, in effect, grafted an additional requirement on the test established by this Court for the purpose of determining whether substantive due process has been violated as a matter of federal law. *See* Petition for Writ of Certiorari, at 12-16. Here, the uncertainty resulting from the vague and inefficacious "unduly oppressive" standard, and the potential for havoc it portends for public policy making, should be considered.

Ironically, the Washington Supreme Court itself, in announcing the "unduly oppressive" test as the third element of a three part substantive due process test conceded that "the third inquiry will usually be the difficult and determinative one." *Presbytery of Seattle v. King County,* 114 Wash.2d 320, 331, 787 P.2d 907 (1990). It added that the standard "lodges wide discretion in the court . . . " *Presbytery,* 114 Wash. 2d at 331.

Indeed, the Washington Supreme Court may have understated the impact of this ill-defined standard. And it has taken little time for the impact to be felt. In August of this year the Washington Court of Appeals issued its opinion in *Powers v. Skagit County,* No. 27988-2-I, Slip Opinion (Wash. Ct. App. Aug. 24, 1992) in which a property owner alleged that the denial of a building permit for a residence to be located in a designated floodway violated substantive due process. Citing *Presbytery, Robinson* and *Sintra* the Court of Appeals reversed a trial court decision granting summary judgment in favor of Skagit County on the substantive due process issue. The plaintiff had admitted the first two prongs of the *Presbytery* substantive due process test were met, i.e., that the floodway regulations were aimed at achieving a legitimate public purpose and that the means were reasonably related to that purpose but argued that the trial court had not adequately considered the third (unduly oppressive) prong. Although Powers submitted only an affidavit that the Court of Appeals itself labeled "conclusory and without supporting facts" in asserting that the floodway regulation was unduly oppressive, the Court of Appeals found that a genuine issue regarding oppressiveness existed, requiring a trial on the merits. *Powers v. Skagit County,* No. 27988-2-I, Slip Opinion, at 8.

The unduly oppressive test as adopted and applied by the Washington courts raises a genuine specter of voluminous litigation in which the courts will review municipal legislation and land use decisions, conceded to be directed at legitimate public purposes and conceded to be related to such purposes, to determine if they nonetheless violate the amorphous "unduly oppressive" test. In

effect, this thrusts the judge into the seat of the legislator or councilmember in determining the propriety and efficacy of legislation. Judicial review under this standard is without rudder or compass. The court must look at the public interest and the private interest, consider all available alternatives, determine where to strike the balance between the two and then announce whether the legislative branch has demonstrated the requisite wisdom. As the City of Seattle has demonstrated in its Petition herein, this Court has long since rejected this "judiciary as legislature" approach. *See* Petition for Writ of Certiorari at 14. But the Washington Supreme Court is firmly committed to obsolete dictum in a 19th Century case of this Court, and will continue to apply it to invalidate rational police power legislation unless review is accepted by this court.

The precise effect of the approach adopted by the Washington Supreme Court is incalculable, but it is a prescription for a vast increase in litigation, and a guarantee that legislatures and local councils will act with timidity in dealing with issues of public concern, lest they subject governing entities to monetary liabilities they can ill-afford. The rights of property owners are adequately protected by the Takings Clause and by procedural due process in the vast majority of cases. Only in extreme cases of "invidious or irrational conduct" should substantive due process be invoked to review land use decisions. *Harding v. County of Door,* 870 F.2d 430, 431 (7th Cir. 1989). By subjecting all land use legislation to review under the "undue oppression" test, the Washington Court displaces this Court's takings jurisprudence. In the context of determining liability under § 1983, the state courts should

not be permitted to expand their review beyond the scope determined by the decisions of this Court and, in that process, effectively become quasi-legislatures of last resort.

CONCLUSION

The court is requested to grant review as requested in the Petition for Writ of Certiorari of the City of Seattle.

RESPECTFULLY SUBMITTED this 15th day of October, 1992.

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No. 92-487

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

vs.

ROY and KATHLEEN R. ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Petitioners,

vs.

SINTRA, INC., KEITH H. HAMACK and PATTI I. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

MOTION OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE SUPPORTING PETITIONERS

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MOTION OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National League of Cities, the U.S. Conference of Mayors and the National Association of Counties respectfully seek leave of this Court to file a brief as amici curiae in support of the Petitioners, and as grounds therefore would state:

1. The National League of Cities is an organization consisting of cities and towns from all areas of the United States.

2. The U.S. Conference of Mayors is an organization consisting of the mayors of cities from all areas of the United States.

3. The National Association of Counties is an organization consisting of counties from all areas of the United States.

4. Pursuant to Supreme Court Rule 37, the movants have obtained permission to file as amici from the Petitioners in this case. The Respondents have refused consent to the filing of the brief of amici curiae.

5. The questions presented to this Court affect the interests of all municipalities and counties in the country.

6. Movants wish to present this Court with additional authorities and arguments with respect to only the first question presented by the Petitioners (substantive due process) and to demonstrate that the resolution of the issue will affect cities and counties outside the State of Washington. Although movants also believe that the qualified immunity issues raised in the third question presented are of grave concern, those issues are adequately addressed by the Petitioners.

WHEREFORE, the National League of Cities, U.S. Conference of Mayors and National Association of Counties

respectfully request leave to file a brief as amici curiae in support of the Petitioners.

Respectfully submitted,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS AND THE NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici are organizations whose members include county and municipal governments and officials throughout the United States. Amici and their members have a vital interest in legal issues that affect the powers and responsibilities of local government to adopt and enforce land use and housing legislation in the public interest. These cases are of critical importance to every local government, since they vastly expand grounds of liability under 42 U.S.C. § 1983. Moreover, there is no reason to believe that the Washington Supreme Court's substantive due process analysis could be limited to land use or housing cases; rather, it would apply equally to all types of regulations at the state and local level.

SUMMARY OF THE ARGUMENT

The Washington Supreme Court has altered the federal law of substantive due process, ignoring all United States Supreme Court precedents, thereby allowing recovery of monetary judgments under Section 1983 on grounds that have never been recognized by this Court. These cases will serve as precedents, not only in the State of Washington, but in other jurisdictions, for each state court to expand or alter the factors used in federal substantive due process analysis under the Fourteenth Amendment of the United States Constitution. The inevitable result will be a patchwork quilt of decisions – some following the separation of powers doctrine and showing deference for state and local legislation, others employing, as here, unprecedented scrutiny in violation of that doctrine.

ARGUMENT

A. Violations of State Law Do Not Constitute a Substantive Due Process Violation.

As set forth in more detail in the petition for a writ of certiorari filed by petitioners, at issue in this case are the provisions of two versions of the City of Seattle's Housing Preservation Ordinance (collectively referred to as "HPO") pertaining to housing replacement and tenant relocation. The stated purpose of the HPO "was to mitigate the loss of low income housing in the city caused by demolition for development and to reduce the hardships experienced by displaced tenants." *Robinson v. City of Seattle*, 830 P.2d 318, 324 (Wash. 1992). The Washington Supreme Court concluded that the HPO violated substantive due process guarantees of the Fourteenth Amendment to the United States Constitution, both on its face (*Robinson*) and as applied to particular property owners (*Sintra, Inc. v. City of Seattle*, 829 P.2d 765 (Wash. 1992)). The HPO also was challenged, unsuccessfully, on the basis that it constituted a taking of property without just compensation in violation of the Fifth Amendment as applied to the states by the Fourteenth Amendment.

In addressing the federal substantive due process issue, the Washington Supreme Court applied a three-prong test set forth in *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, ___ U.S. ___, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990) which inquires: "(1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner." *Id.*, 830 P.2d at 329; *Sintra*, 829 P.2d at 776. The Washington Supreme

Court noted that prior decisions of that court had invalidated the housing replacement provisions and tenant relocation provisions only under state law, but that those decisions did not address federal constitutional issues. *See Robinson*, 830 P.2d at 325-326.

In both cases, the Washington Supreme Court found that the preservation of low income housing units was a legitimate public purpose, and, therefore, the first prong of the *Presbytery* test had been satisfied. In *Robinson* (involving the facial challenge), the court also found that the means used in the ordinance were reasonably necessary to achieve that purpose, and therefore the second prong had been satisfied. In *Sintra* (involving an "as applied" challenge), the court stated that it need not decide whether the second prong had been satisfied due to its finding on the third prong.

In both cases, the court found that the HPO was "unduly oppressive" and therefore violated substantive due process under the third prong of the *Presbytery* analysis. In determining whether a regulation is unduly oppressive, the *Presbytery* court had suggested certain nonexclusive factors to be considered in balancing the interests of the public against those of the regulated landowner:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary

> or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Robinson, 830 P.2d at 331 (quoting *Presbytery*); *Sintra*, 829 P.2d at 776-777 (quoting *Presbytery*). Consideration of these criteria led the court to its conclusion that the HPO violated substantive due process guarantees under the Fourteenth Amendment.

The Washington Supreme Court's conclusion in the *Sintra* case that the application of the HPO violated federal substantive due process appears to be influenced by the City's conduct of enforcing the HPO after portions thereof had been ruled invalid by a trial court under state law. However, this Court has long recognized that mere violations of state or local law seldom rise to the level of constitutional violations. *See Screws v. United States*, 321 U.S. 91, 108, 65 S. Ct. 1031, 1039, 89 L.Ed. 1495, 1506 (1945). Thus, in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Court held:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

424 U. S. at 698-699, 96 S. Ct. at 1159, 47 L. Ed. 2d at 412. *See also, Collins v. City of Harker Heights,* ___ U.S. ___, 112 S. Ct. 1061, 1070-1071, 117 L. Ed. 2d 261, 275-276 (1992); *PFZ Properties, Inc. v. Rodriguez,* 928 F.2d 28, 32 (1st Cir. 1991), *cert. granted,* ___ U.S. ___, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), *cert dismissed as improvidently granted,* ___ U.S. ___, 112 S. Ct. 1151, 117 L. Ed. 2d 400 (1992) ("[A]llegations that . . . officials failed to comply with agency regulations or practices in the review and approval process . . . are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution"); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) ("Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law").

B. There Can be No Substantive Due Process Violation Where the Legislation Substantially Advances Legitimate State Interests.

In applying the three-prong test of *Presbytery* – a test established under Washington law – the Washington Supreme Court grafted its own constitutional analysis onto the Fourteenth Amendment. In the process, the court ignored controlling federal precedent.

The three-prong test of *Presbytery* has never been articulated by this Court for purposes of federal substantive due process analysis. To the contrary, this court has traditionally been highly deferential to the legislative

decisions made by state and local governments in the area of social and economic legislation. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955), the Court considered a due process challenge to an Oklahoma law which made it unlawful for anyone other than a licensed optometrist or ophthalmologist to fit eyeglass lenses or to replace lenses in frames. The Court observed that the law "may exact a needless, wasteful requirement in many cases," but that judgment was one for the legislature. 348 U.S. at 487; 75 S. Ct. at 464; 99 L. Ed. at 571. Adding that "the law need not be in every respect logically consistent with its aims," the Court stated the constitutional test to be that "it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U.S. at 487-488; 75 S. Ct. at 464; 99 L. Ed. at 572. The use of criteria such as the loss of value to the property owner has been expressly rejected by this Court for substantive due process purposes. *See Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424, 72 S. Ct. 405, 407, 96 L. Ed. 469, 473 (1952).

During the last term, the Court held that only government acts or omissions which could be properly characterized as "conscience-shocking" constituted violations of substantive due process. Once again, the court's comments suggested a separation of powers underpinning for this constitutional analysis:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area

> are scarce and open-ended. [Citation omitted] The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, supra, ___ U.S. at ___, 112 S. Ct. at 1068, 117 L. Ed. 2d at 273.

Applying the proper federal standards, the Washington Supreme Court should have found that the HPO comported with substantive due process requirements. Indeed, it is ironic that the court found the HPO to violate substantive due process while at the same time finding that the ordinance substantially advanced legitimate state interests for purposes of the takings analysis. In *Robinson,* the court found that "the housing replacement and tenant assistance provisions were substantially related to preserving low income housing and assisting tenants experiencing relocation hardships," and thus "the ordinance did advance legitimate state interests in the general welfare of the citizens of Seattle in attempting to preserve rental housing stock and assist low income tenants, and therefore was not a per se taking." 830 P.2d at 330.

The court's conclusions are ironic because substantive due process analysis should be more, not less, deferential to legislative judgment than takings analysis. This point was recognized in *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), where the Court noted that the takings analysis involved a more exacting scrutiny than substantive due process or equal protection analysis:

> . . . Our opinions do not establish that these standards are the same as those applied to due

> process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, [citation omitted] not that "the State 'could rationally have decided' the measure adopted might achieve the state's objective." [Citation omitted]

483 U.S. at 834-835 n.3, 107 S. Ct. at 3147 n.3, 97 L. Ed. 2d at 688 n.3. Having concluded that the HPO "substantially advanced a legitimate governmental interest" for purposes of takings analysis under this more exacting standard, how could the court then conclude that the HPO does not comply with the lenient substantive due process standard that the ordinance be rationally related to a legitimate governmental interest?

CONCLUSION

The Washington Supreme Court having applied the wrong standard for reviewing the constitutionality of the HPO on substantive due process grounds, the petition for certiorari should be granted and the decision of that court should be reversed and a judgment entered finding that the HPO satisfies the requirements of the Due Process Clause of the Fourteenth Amendment. Alternatively, the Court should exercise its supervisory authority to vacate the judgments and remand the cases back to the Washington Supreme Court for reconsideration of the substantive

due process issue under *Collins* and other Supreme Court precedent.

Respectfully submitted,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

REPLY BRIEF OF PETITIONERS[1]

Our petition sought review of three questions. The first was whether a land use ordinance that is found to be a reasonable means of achieving a legitimate public purpose, and is not found to effect a "taking," may nevertheless be held to be "unduly oppressive" in violation of substantive due process guaranteed by the Fourteenth Amendment. Respondents agree that this question warrants this Court's review and devote the first section of their brief in opposition to a discussion of its merits.

The second question presented in our petition is whether continued general enforcement (against nonparties) of a land use ordinance, after a state trial court has declared it invalid but before any appellate ruling, is in itself a violation of "substantive due process" giving rise to a damage remedy under 42 U.S.C. § 1983. We argued that mere nonacquiescence in a trial court's decision falls far short of the kind of "egregiously unacceptable, outrageous, or conscience-shocking" behavior that gives rise to a constitutional damage claim. (Pet. 20, quoting *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990) *cert. denied*, 111 S. Ct. 713 (1991)); *see also Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217-1222 (6th Cir. 1992) (collecting cases).

Respondents, citing no federal cases, merely recite (Br. in Opp. 4-5) some of the facts of *Robinson* and *Sintra*

---

[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the City of Seattle is a municipality and, as such, has no parents or subsidiaries. All of the other petitioners are individuals.

(making various factual errors and misleading assertions),[2] adding modifiers like "wilful, deliberate and malicious" (Br. in Opp. 5) that are not based on any finding of the state courts. However, the City does not argue, as respondents assert (Br. in Opp. 5), that "it may disregard trial court decrees of facial invalidity with impunity."[3] We do argue that the Due Process Clause does not mandate application of offensive nonmutual collateral estoppel against a local government that believes in good faith that a state trial court has erred in ruling that an ordinance conflicts with state law and therefore continues to apply that ordinance to nonparties pending resolution of the issue by a higher court.[4] The Washington Supreme Court's ruling that such conduct

---

[2] For example, only the replacement housing provisions of HPO I were declared facially invalid; HPO II did differ significantly from HPO I (as acknowledged in *Robinson*, Pet. App. 3a-4a, and in *San Telmo Assocs. v. Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987)); and Sintra was granted relief from and never paid the $219,000 for replacement housing.

[3] The city can be subjected to liability *under state law* if its belief that the ordinance ultimately will be held valid is shown to have been erroneous, as demonstrated by the disposition of state law claims in *Robinson*.

[4] Nor must a city take an appeal (which may be unwarranted for any number of reasons, *see* Pet. 18 n.12), as the price of avoiding damages under federal law for any future enforcement of the ordinance. Respondents argue that the trial court rulings on HPO II had collateral estoppel effect pending the city's appeals, citing state law authorities, but they ignore the well established rule in Washington that that doctrine does not blindly foreclose relitigation of important issues. *See, e.g., Southcenter Joint Venture v. NDPC*, 113 Wash. 2d 413, 780 P.2d 1282 (1989), citing *Kennedy v. Seattle*, 94 Wash. 2d 376, 617 P.2d 713 (1980).

exposes the local government to liability under § 1983 is both important and wrong.

The third question presented in our petition is whether the continued enforcement of the HPO upon advice of official counsel, after a trial court ruling in another case, violated a "clearly established" federal constitutional right, so as to deprive the individual petitioners of qualified immunity. In response, respondents offer no argument or authority whatever for the proposition that any constitutional right at issue here was "clearly established." Instead, with some misstatements of fact,[5] respondents seek to turn the question into whether advice of counsel is an absolute defense, and argue that petitioners are proposing a purely subjective test.

Respondents' diversionary tactic must fail. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity protects city officials unless the plaintiff carries its burden of proving a violation of a "clearly established" federal right. Under *Anderson v. Creighton*, 483 U.S. 635,

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[5] For example, the statement that the City Attorney's advice was "a tactical decision . . . to reap ill-gotten gains", Br. in Opp. 6, has no support in the record. Respondents also state that City officials acted "contrary to the advice of the City Attorney" in declining to provide full administrative relief to Sintra (Br. in Opp. 7), but the record shows the City Attorney's office merely *recommended* against a particular condition on that relief, while advising that "the Ordinance is still valid and should be enforced." *Sintra* CP 316-17. Finally, the remark by James Fearn, a former Assistant City Attorney (Br. in Opp. 6), was only that the courts would have "no problem" finding a taking *in a case where the HPO would deny all economically viable use. Robinson* CP 121.

641 (1987), immunity applies if a reasonable official *could have believed* her actions to be lawful in light of clearly established law. We did not argue that legal advice is dispositive, although it is plainly relevant to the inquiry. We did argue that no clearly established federal right is involved in this case and that the Washington Supreme Court erred by flatly refusing to consider official legal advice and by failing to determine whether the individual petitioners could reasonably have believed that their actions did not violate any clearly established federal right. *See Romero v. Kitsap County*, 931 F.2d 624, 630 (9th Cir. 1991) (arresting officer who knew of trial court bench ruling condoning plaintiff's actions nonetheless enjoyed qualified immunity, since his further knowledge that prosecutors did not accept the ruling and would appeal would lead a reasonable officer to "conclude that the law was still in controversy rather than clearly established").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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